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International Court of Justice

THE HAGUE

Cour internationale de Justice

LA HAYE

YEAR 2012

Public sitting

held on Thursday 26 April 2012, at 3 p.m., at the Peace Palace,

President Tomka presiding,

in the case concerning the **Territorial and Maritime Dispute (Nicaragua *v.* Colombia)**

VERBATIM RECORD

ANNÉE 2012

Audience publique

tenue le jeudi 26 avril 2012, à 15 heures, au Palais de la Paix,

sous la présidence de M. Tomka, président,

en l'affaire du **Différend territorial et maritime (Nicaragua c. Colombie)**

COMPTE RENDU

Present:		
	President	Tomka
	Vice-President	Sepúlveda-Amor
	Judges	Owada
		Abraham
		Keith
		Bennouna
		Skotnikov
		Cançado Trindade
		Yusuf
		Greenwood
		Xue
		Donoghue
		Sebutinde
	Judges *ad hoc*	Mensah
		Cot
	Registrar	Couvreur

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Présents : M. Tomka, président
M. Sepúlveda-Amor, vice-président
MM. Owada
Abraham
Keith
Bennouna
Skotnikov
Cançado Trindade
Yusuf
Greenwood
Mmes Xue
Donoghue
Sebutinde, juges
MM. Mensah
Cot, juges *ad hoc*

M. Couvreur, greffier

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The PRESIDENT: Please be seated. The sitting is now open. This afternoon the Court will hear the arguments of Colombia in the first round, and Colombia will continue its arguments also tomorrow.

Let me give the floor to His Excellency Mr. Julio Londoño Paredes, Agent of the Government of Colombia. You have the floor, Sir.

Mr. LONDOÑO:

1. AGENT'S OPENING SPEECH

1. Thank you, Mr. President. Mr. President and distinguished Judges, it is a great honour for me to address the Court, as Agent of the Republic of Colombia, in these hearings relating to the case brought by Nicaragua against Colombia.

2. In its Judgment of 13 December 2007 the Court held that it was clear from the text of Article I of the 1928 Treaty, that the issue of sovereignty over the islands of San Andrés, Providencia and Santa Catalina was settled by that instrument[1]. The Court went on to consider that that Article did not provide "the answer to the question as to which maritime features apart from the islands of San Andrés, Providencia and Santa Catalina *form part of the San Andrés Archipelago over which Colombia has sovereignty*" (*Territorial and Maritime Dispute (Nicaragua* v. *Colombia), Preliminary Objections, Judgment, I.C.J. Reports 2007 (II)*, p. 863, para. 97; emphasis added).

3. When referring to the clause of the 82nd meridian included in the 1930 Protocol of Exchange of Ratifications, the Court stated that the language of the provision in the Protocol is more consistent with the contention that it was intended to fix the western limit of the San Andrés Archipelago[2].

4. Mr. President and Members of the Court, the archipelago of San Andrés is not a group of scattered islands that nobody knows or cares about. Not only is it one of the 32 Colombian

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[1] *Territorial and Maritime Dispute (Nicaragua* v. *Colombia), Preliminary Objections, Judgment, I.C.J. Reports 2007 (II)*, p. 861, para. 88.

[2] *Ibid.*, p. 867, para.115.

provinces, together with the waters between the islands, it has been part of the country's history and national identity for over two centuries. It has a very special significance for every Colombian.

5. The archipelago is formed by the islands of San Andrés, Providencia and Santa Catalina; the cays of Roncador, Quitasueño, Serrana, Serranilla, Bajo Nuevo, Alburquerque, East-Southeast cays, together with appurtenant features. Geographically and historically, the islands and cays of the archipelago have been considered as a unit throughout the colonial and post-colonial era, and prior to and after the 1928/1930 Treaty.

6. All the maritime features Nicaragua now claims before the Court are part of the San Andrés Archipelago, over which Colombia has exercised sovereignty in an effective, peaceful and uninterrupted manner for two centuries. Each and every one of them.

7. This is shown by the evidence submitted by Colombia with its Counter-Memorial. This wide array of evidence includes, among others, formal statements, diplomatic exchanges, as well as administrative acts from national and local authorities of the archipelago[3]. The evidence also comprises the recognition of Colombian sovereignty by third-State governments[4]. The facts are what the evidence shows them to be, despite Nicaragua's attempts to ignore, underplay or plainly distort it.

8. As Colombia explained, its sovereignty over the San Andrés Archipelago dates back to the Royal Order of 1803. That provision placed it, along with the Mosquito Coast, under the jurisdiction of the Viceroyalty of Santa Fe (New Granada)[5].

9. In 1913, for the first time, Nicaragua purported to claim that the archipelago belonged to it. It did so in response to Colombia's protest over a treaty signed by Nicaragua and the United States in which, *inter alia*, the former granted the latter a lease over the Corn Islands that were also part of the archipelago and had been forcefully occupied by Nicaragua since 1890[6].

10. After 15 years of negotiations, in 1928, the Esguerra-Bárcenas Treaty was concluded. In the Treaty, that in the words of its Preamble "put an end to the territorial dispute pending between"

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[3]RC, pp. 41-44, para. 2.22.

[4]CMC, Vol. II-A, Anns. 24, 25, 38, 40, 44, 61, 63-65, 67, 69-100, 103-110, 113-126, 173, 174, 180, 184-187; Vol. II-B, Apps. 3-8.

[5]*Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua* v. *Honduras), Judgment, I.C.J. Reports 2007(II),* pp. 708-709, para. 161.

[6]CMC, pp. 241-242, paras. 5.1-5.2.

both countries, Nicaragua recognized Colombia's sovereignty over the San Andrés Archipelago and Colombia recognized Nicaragua's sovereignty over the Mosquito Coast and the Corn Islands[7].

11. Subsequently, in a published document called "Official Opinion on the end of the Dispute with Colombia"[8], the Government of Nicaragua stated that the Treaty "put an end to the controversy that for many years" it had held with Colombia, and added that the core issue for Nicaragua during the negotiation of the Treaty was the sovereignty over the Mosquito Coast and the Corn Islands[9].

12. The cays of Quitasueño, Roncador and Serrana were dealt with differently in the Treaty, not because they were not part of the Archipelago, but because they were the object of a dispute *solely* between Colombia and the United States of America.

13. Quitasueño, as well as Roncador and Serrana, were the object of a dispute between Colombia and the United States for nearly a century and a half[10]. Likewise, between 1874 and 1927, the fishing activities of British subjects from the Cayman Islands in Quitasueño were the subject of diplomatic exchanges with Great Britain[11]. Nicaragua never voiced the slightest comment in relation to these facts.

14. Going back to the 1928 Treaty, the fact of the matter is that Nicaragua accepted that *sovereignty*, yes, sovereignty, over the three cays was in dispute solely between Colombia and the United States and never stated any claims over them.

15. A month after the signature of the Treaty with Nicaragua, that country's Government and Congress raised no protest when they were officially notified by Colombia of the conclusion of an agreement with the United States, providing that Colombian nationals would continue conducting fishing activities on the three cays, while the United States would continue to operate the aids to navigation installed thereon[12].

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[7]CMC, pp. 247-249, paras. 5.12-5.14.

[8]*Ibid.*, Vol. II-A, Ann. 196, p. 725.

[9]*Ibid.*, p. 726.

[10]CMC, Vol. I, pp. 99-112, paras. 3.44-3.45, 3.47-3.71, and Chap. 4, Sect. B; Vol. II-A, Ann. 25, 72-73, 75-77, 79-82, 86, 90, 96-97, 99-100.

[11]*Ibid.*, pp. 201-203, paras. 4.103-4.108.

[12]*Ibid.*, pp. 255-259, paras. 5.31-5.38.

16. But that is not how the story ended. During the approval process of the 1928 Treaty, the Nicaraguan Government and Congress considered that there should be a *sine qua non* condition for its approval[13]. This was the adoption of the 82nd meridian as a limit, with the main object of attaining Colombia's recognition that the features located west of that meridian, apart from the Corn Islands, also belonged to Nicaragua.

17. Could the Nicaraguan Government and Congress have demanded the inclusion of that clause if they considered, even remotely, that Nicaragua had any sort of rights over the cays, islets and banks located to the east of the 82nd meridian? The answer is no, it is not possible.

18. The Colombian Government accepted the proposed limit in that vein, and under the understanding also that, according to the words of the Nicaraguan Foreign Minister himself, it was "indispensable for the question to be at once terminated forever"[14]. The clause was included in the Protocol of Exchange of Ratifications. The agreed limit did not entail that the islands and cays located east of it were also Nicaraguan. If that had been the case, there would have been no need for any such limit.

19. Mr. President and distinguished Judges, the motivation behind Nicaragua's proposal was that the cays located to the west of the 82nd meridian might in fact be revindicated by Colombia as part of the archipelago. Particularly, the Miskito cays, a group of some 70 islets and cays, located to the north, some 35 miles off the Nicaraguan coast. Several Nicaraguan sources, including the Memorial filed in these proceedings[15], have confirmed this to be the case.

20. This was evidenced in the context of the process leading up to the approval of the 1928 Treaty. A Note of 11 February 1930 from the chargé d'affaires, *a.i.*, of the United States in Nicaragua, to the Secretary of State, at tab 6 of the judges' folders, gives the following account:

> "the Acting Minister for Foreign Affairs told me that there were a large number of small and unimportant islands and cays within a short distance of the east coast of Nicaragua and the proposed interpretation or clarification of the treaty was to insure *that ownership of those islands would not at a later date become the subject of another controversy between Nicaragua and Colombia*"[16].

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[13]CMC, pp. 261-262, para. 5.44.

[14]*Ibid.*, Vol. II-A, Ann. 199, p. 736.

[15]MN, p. 7, para. 16; p. 176, para. 2.251.

[16]CMC, Vol. II-A, p. 731, Ann. 197: Note No. 1316, from the United States chargé d'affaires, *a.i.* at Managua, to the Secretary of State, 11 Feb. 1930; emphasis added.

21. Seventy years later, this remained Nicaragua's position. Mr. Alejandro Montiel Argüello, former Foreign Minister of Nicaragua, in an interview granted to the Nicaraguan press in 2003, at tab 8 of the judges' folders, stated that the 82nd meridian, "had the purpose of preventing Colombia from claiming that Nicaraguan islands, such as the Miskito cays, were part of the San Andrés Archipelago"[17].

22. Neither Nicaragua nor Colombia ever considered that the purpose of including the limit would be to leave the possibility open for Nicaragua, whenever it saw fit, to claim any of the islands, cays or islets located east of that limit. This argument defies logic and crashes against the weight of the evidence, contradicting the good faith that should govern treaty relations.

23. Mr. President, Members of the Court, after the Treaty's entry into force, Colombia considered the 82nd meridian as the limit of its jurisdiction, for purposes of all of its activities, including, among others, fishing regulation and control and surveillance of the area.

24. Since the nineteenth century, the population of the San Andrés Archipelago had been conducting fishing activities up to the Mosquito Coast. Following the 1928/1930 Treaty, their traditional fishing activities continued, but limited up to the aforesaid meridian[18]. Fishing activities in this entire area have always been so essential for the archipelago's inhabitants[19] that depriving them of these resources would entail serious consequences for their livelihood.

25. The relevant area for drawing a single maritime boundary delimiting the areas of the continental shelf and exclusive economic zone appertaining to both countries is the area between the relevant islands and cays of the archipelago, on the one hand, and Nicaragua's relevant coasts, on the other[20].

26. The islands of San Andrés, Providencia and Santa Catalina, that have a population of nearly 80,000 inhabitants[21], face the Nicaraguan coast at distances between 103 and 120 miles.

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[17]"La Prensa" (Nicaraguan newspaper), Managua, 28 April 2003; issue No. 23072. Available at: http://archivo.laprensa.com.ni/archivo/2003/abril/28/politica/politica-20030428-10.html.

[18]CMC, p. 371, para. 8.79.

[19]*Ibid.*, Vol. II-A, Ann. 87.

[20]CMC, Chap. 8, Sec. B; RC, Chap. 5, Sec. B.

[21]POC, para. 1.10, fn 17.

The rest of the islands that are part of the archipelago lie at distances ranging between 106 and 266 miles off that coast.

27. Colombia has shown that, in accordance with international law, the delimitation should be effected by means of a median line between the islands, islets and cays of the San Andrés Archipelago, which are naturally entitled to the full range of maritime spaces in all directions, on the one hand, and Nicaragua's relevant coast, on the other[22].

28. Some of the relevant base points of the line are on Quitasueño, which is an important group of 34 features permanently above water at high tide and many low-tide elevations, located 38 miles north of the islands of Providencia and Santa Catalina, and therefore, within the 200 miles of exclusive economic zone and continental shelf of those islands.

29. The median line posited by Colombia is also consistent with the relevant circumstances in the area to be delimited, including the 82nd meridian that was understood and treated as a limit for several decades. Therefore, it is not surprising that the median line follows approximately the same direction and is in the same general area as the 82nd meridian.

30. Mr. President and Members of the Court, we are now entering the last stage of these proceedings in which Nicaragua has advanced exorbitant and unfounded claims in the hope that the Court will award it something at Colombia's expense. Colombia strongly rejects Nicaragua's unfounded accusations as to the alleged use of force by Colombia to prevent its access to areas that have *never* belonged to Nicaragua and that it now claims.

31. Nicaragua never protested the routine fishing activities of Colombian vessels from San Andrés and Providencia, under the oversight and control of the Colombian authorities in the cays and maritime areas *east* of the 82nd meridian.

32. Nor has it protested the recurrent activities conducted by over 700 United States vessels, under licences issued by Colombia since the 1983 Agreement between Colombia and the United States, for fishing activities in Quitasueño as well as in Roncador and Serrana[23].

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[22]CMC, Chap. 9, Sec. C; CR, Chap. 6, Sec. D.

[23]*Ibid.*, Vol. I, paras. 4.62-4.68; Vol. II–A, Anns. 8, 147-148, 153 and 156; Vol. II–B, App. 6. RC, paras. 5.35, 8.39 and 8.53.

33. It is therefore astonishing that Nicaragua should now attempt to claim any sort of right over any of the archipelago's cays. That cannot be accepted by Colombia.

34. Colombia regrets Nicaragua's frequent attempts to distort the facts and misrepresent Colombia's position, which is based on history and is fully consistent with the rules and principles of international law.

35. Colombia is confident that the maritime delimitation treaties concluded with its other neighbours, the fishing agreements concerning areas adjacent to the cays of Roncador, Quitasueño and Serrana, the maritime interdiction agreements against drug trafficking and others relating to the preservation of the environment, will be duly taken into account[24].

36. Colombia trusts that the Court will put a stop to Nicaragua's attempt to have the Court deliver to it, on a silver platter, islets and cays over which my country has exercised exclusive sovereignty since its independence, as well as maritime areas that have been absolutely essential for the livelihood of the population of the San Andrés Archipelago.

37. Mr. President, Colombia's presentation will continue with Professor James Crawford, who will provide a general overview of the case; thereafter, Professor Marcelo Kohen and Mr. Rodman Bundy will examine Colombia's sovereignty over the archipelago and its features, as well as the confirmation of that title through *effectivités*. Professor Crawford will address the subject of Quitasueño and then he and Rodman Bundy will set out Colombia's case on maritime delimitation. Finally, Professor Kohen will examine Nicaragua's request for a declaration.

38. Mr. President, distinguished judges, I would be grateful if the floor could now be given to Professor James Crawford. Thank you very much.

The PRESIDENT: Thank you very much, Your Excellency. And I invite Professor Crawford to present Colombia's general overview of the case. You have the floor, Sir.

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[24]CMC, paras. 8.33-8.56; 9.65-9.70; 9.81. RC, Chap. 5, Sec. B (2).

Mr. CRAWFORD: Thank you, Mr. President.

2. GENERAL OVERVIEW

Introduction

1. Mr. President, Members of the Court, in its Application, Nicaragua made three claims[25].

— First, it challenged Colombia's sovereignty over the San Andrés Archipelago, a territory of Colombia since the time of independence, over which Nicaragua has never held any title, and where it has never exercised any effective presence, and which claim it had anyway renounced by the Treaty of 1928, in which it recognized Colombia's sovereignty over the archipelago and all its features east of the 82nd W meridian.

— Second, Nicaragua asserted that it was entitled to a single maritime boundary, which covered a vast area of the Caribbean Sea, including — as it turned out — an "EEZ" up to a distance of between 230 and 280 nm from Nicaragua's coast. If this had been a reading exercise of the 1982 Convention, Nicaragua failed already.

— Third, Nicaragua demanded compensation, apparently for the normal exercise by Colombia of governmental functions in the relevant area — the quantum to be assessed in a separate phase. Nicaragua, as you have heard, attaches no value to our cays — I think it would have been different, in terms of quantum, if they had won them!

2. Colombia answered each of these three claims, on the first point based on its historic rights and on the legal title deriving from the 1928 Treaty; on the second point by an accurate reading of the admittedly difficult technical term "200 nautical miles" in Article 57 and, on the third point, by noting the inappropriateness of Nicaragua's claim to damages for the period pending the resolution of a territorial or maritime dispute — a point confirmed by the pertinent remark of Judge *ad hoc* Gaja — as he then was — in the 2007 Judgment (declaration, Judge *ad hoc* Gaja, *Territorial and Maritime Dispute (Nicaragua* v. *Colombia), Preliminary Objections, Judgment, I.C.J. Reports 2007 (II)*, p. 934).

3. So in its Reply Nicaragua perforce changed its position. Now it palely claimed features on the basis that they are *not* part of the Archipelago. Now it claimed "only" a continental shelf

[25]Application of Nicaragua, p. 8, para. 8.

boundary based on alleged geomorphological considerations — an entirely new claim — while disclaiming the EEZ delimitation. Its claim line was between 487 and 324 nm from the Nicaraguan coast. But — no longer attentive to its *ad hoc* judge — Nicaragua continued to claim reparation.

4. And now, this week, we have had the third mutation. As to the islands claimed, the position is unclear — for example, have they given up on Alburquerque — as Professor Pellet implied when giving us spelling rights — or is it that they have simply forgotten it — as Mr. Reichler seemed to have done? But whether their territorial claim has changed, their maritime claim has certainly changed. True, it was a little unclear whether Mr. Reichler was an alternative to Professor Lowe or whether they were supplements. We assume the latter, in which case we are faced with the following composite claim — an EEZ out to 200 nm subject only to narrow enclaves[26], and a continental shelf claim out to between 335 and 505 nm — that line is drawn half way between our 200 nm limit and the alleged outer limit of Nicaragua's extended continental shelf[27]. But the compensation claim has mutated into a claim for satisfaction — as if depriving the archipelago of virtually all its maritime zones would not be satisfaction enough!

5. There is a well-known children's story popularized by Walt Disney — *Winnie the Pooh*. Winnie is asked whether he wants condensed milk or honey on his bread — he says in a growly voice "both!"[28] The Nicaraguan Winnie first wants an "EEZ" of 250 nm, then he wants a continental shelf of 400 nm. Then he wants both: an EEZ of 200 miles and a continental shelf that veers out to more than 500 miles at its northern extreme. The numbers have changed slightly, the claims have cumulated. Quite an appetite!

6. Mr. President, Members of the Court, three pleadings, three cases, three different and conflicting sets of claims. Never in the course of human forensic conflict has there been a less consistent, less constant case, one more motile and opportunistic. The Court will understand that we cannot in the time available in the first round comment on all aspects of Nicaragua's third mutation — we will do our best.

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[26]CR 2012/10, pp. 45-48, paras. 51-58 (Reichler).

[27]CR 2012/9, pp. 25-34, paras. 24-65 (Lowe).

[28]A. A. Milne, *Winnie-the-Pooh*, London, Mammoth, 1989, p. 23.

Nicaragua's residual case to features allegedly not part of the archipelago

7. One obvious way in which Nicaragua was opportunistic was in its claim to the archipelago. For many reasons — not least the express language of the 1928 Treaty — that claim lacked legal credibility. This is true *a fortiori* when you take into account the Protocol of Exchange of Ratifications of 1930 which — at Nicaragua's initiative — fixed the 82° W meridian as the eastern limit of Nicaraguan claims as well as the western limit of Colombian claims[29]. In your Judgment of 13 December 2007, you determined explicitly, one might say summarily, that Nicaragua's territorial claim to the archipelago was settled by the 1928 Treaty. So now we have a still less legally credible claim to islands which, according to Nicaragua now, are *not* part of the archipelago. An initial claim in 1913 to the archipelago mutates a century later into a claim to the *not*-archipelago!

8. Mr. President, Members of the Court, a State which asserts an original title to a territory should, one would think, have a clear idea of the territory to which its title extends. Nicaragua, however, in the territorial branch of its case, has had considerable difficulty in saying precisely where its claims against Colombia begin and, moreover, where they might end. The first indication that Nicaragua *had* a claim to the archipelago was in 1913. That was a claim to the archipelago as a whole[30]. It was settled definitively in 1928. There the matter remained for forty years. It was only in 1972 that Nicaragua claimed three parts of the archipelago specifically — Roncador, Serrana and Quitasueño — on the basis that they were located on "its" continental shelf. Of course, that inverted the logic of the law of the sea — land territory comes first and maritime jurisdiction is a sequel. But — setting Nicaragua's confusion on that point to one side — it was only in 1980 that Nicaragua said, for the first time, that Roncador, Serrana and Quitasueño did not form part of the archipelago[31].

9. But these three islands were only a beginning. The Application of 2001 added Serranilla[32]. The Memorial, added Alburquerque, East-Southeast Cays and Bajo Nuevo[33].

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[29]Protocol of Exchange of Ratifications of 5 May 1930 to the Treaty Concerning Territorial Questions at issue between Colombia and Nicaragua, Managua, 24 March 1928 (Esquerra-Bárcenas): Ann. 1, CMC Vol. II-A, p. 4.

[30]See Ann. 36, CMC, Vol. II-A, pp. 171-177.

[31]MN, Vol. II, Ann. 73: Ministerio del Exterior, *White Paper (Libro Blanco sobre el caso de San Andrés y Providencia),* 4 Feb. 1980.

[32]Nicaragua Application, 6 Dec. 2001, p. 2, para. 2.

10. Colombia's case has always been that the 1928 Treaty settled comprehensively any and all territorial questions between the two States. Nicaragua, having given no indication for 50 years that it had any doubt as to the validity of the Treaty, began, after 1980, to assert that the Treaty was a nullity. In your Judgment of 13 December 2007, you rejected again that line of attack, categorically and summarily[34].

11. Nicaragua's further line of attack was to say that the 1928 Treaty failed to settle the question of sovereignty[35]. But you were clear that the Treaty *did* settle the question of sovereignty over the archipelago. That involved two distinct findings. First, it allowed you to "dispose of the issue of the three islands of the . . .Archipelago expressly named in the first paragraph of Article I" (*Territorial and Maritime Dispute (Nicaragua* v. *Colombia), Preliminary Objections, Judgment, I.C.J. Reports 2007 (II)*, p. 861, para. 90). Second, the Treaty settled any question as to sovereignty over the archipelago as a whole — that is to say, all "the other islands, islets and cays that form part of the Archipelago" are territory of Colombia (*ibid.*, p. 855, para. 66).

12. Yet in its Reply, Nicaragua tells you that "acceptance of the conditions under which jurisdiction has been recognized does not imply that she has changed or renounced her historical claim"[36]. This is surprising. As if a party must "accept" a decision for it to have legal effect! As if a determination duly made is not only to be subject to a party's later "acceptance" but also to any reservations it may choose to adopt! You might think that the law of reservations has increased, is increasing and ought to be diminished! In Nicaragua's view, apparently, its omnibus sovereignty claim, which you rejected explicitly on the ground that sovereignty over the archipelago was decided long ago, affects only the jurisdiction in these present proceedings — and affects that question only conditionally, "dans le cadre de cette procédure", as Professor Remiro-Brotóns put it on Monday[37]. *Pacta sunt servanda* is for Nicaragua a territorially meaningless maxim!

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[33]MN, Submission (2), p. 265.

[34]*Territorial and Maritime Dispute (Nicaragua* v. *Colombia), Preliminary Objections, Judgment, I.C.J. Reports 2007 II*, p. 859, paras. 80-81.

[35]MN, pp. 125-177, paras. 2.139-2.253.

[36]RN, p. 3, para. 10.

[37]CR 2012/8, p. 33, para. 4 (Remiro Brotóns).

13. To summarize, there have been two phases to Nicaragua's territorial case, the expansionist and the contractionist. During the expansionist phase, prior to 2007, the territorial scope of the claim expanded as Nicaragua became aware of more islands it could claim — like a child in a strange sweet shop. True, Nicaragua adduced nothing further by way of evidence to support its claim — this was apparently a fact-free claim. Not only did this relieve Nicaragua's counsel from the tiresome necessity of pleading facts; it also saved them from contradiction, since the case they would have had to plead to support their expansionist claim would have roundly contradicted their contractionist one. You can just hear Professor Pellet waxing lyrical on the unity of the archipelago! But now, after 2007, in the contractionist phase everything has changed (or almost everything — there are still no facts). The two principal propositions in Nicaragua's Reply have been, first, that the islands it claims do *not* form part of the archipelago; and, second, that islands *not* part of the archipelago belong to Nicaragua[38]. But there is an unresolved tension here. Nicaragua's version of the archipelago may have shrunk but the second proposition suggests that the implicit basis of Nicaragua's claims has not shrunk with it. Indeed the second proposition seems to lack any outer boundary at all: all that which is not part of the archipelago is Nicaraguan. As Nicaragua professes to understand the geography, this is an area with no clear northern or southern limit — and no clear eastern limit either. As in one's dreams, the sweet shop has no limit. On this basis one wonders whether there may be a Nicaraguan claim to Cuba — which is, I freely admit, not part of the archipelago.

14. In order to avoid a juridical invasion of Cuba, Nicaragua has to limit its claims east of the 82° W meridian to territories historically considered part of the archipelago. Yet the archipelago is an historic and administrative concept associated with Colombian administration. If a given island was administered by Colombia and was considered as part of the archipelago, there is no room for the theory that it was somehow not part of the archipelago. Nicaragua's sovereignty thesis falls apart, it is quite simply incoherent.

15. As to the composition of the archipelago, we rely on the Royal Order of 1803[39]. In your Judgment in *Nicaragua/Honduras,* you said that "the Vice-Royalty of Santa Fé [the predecessor of

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[38]See RC, p. 30, para. 2.3.

[39]RN, p. 39, para. 1.49.

Colombia, for relevant purposes] gained control over the part of the Mosquito Coast running south from Cape Gracias a Dios by virtue of the Royal Decree" of 1803" (*Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua* v. *Honduras), Judgment, I.C.J. Reports 2007 (II)*, p. 709, para. 161). We entirely agree. Nicaragua refuses to offer any coherent interpretation as an alternative to that set out by Colombia. In terms of actual administration Colombia has tendered extensive evidence of its administration of the archipelago as a unit and of each of its components. This has included diplomatic correspondence; consistent and continued acts by Colombian authorities *à titre de souverain*; recognition by neighbouring States; recognition by States outside the region; and the consistent manner in which maps, including Nicaraguan maps, have treated the archipelago[40]. I draw your attention particularly to the Holguin Report of 1896, which in and of itself puts an end to any suggestion that the archipelago is a recent invention[41].

16. The 1928 Treaty was complete as concerns any territorial question that might have existed between Colombia and Nicaragua; the archipelago as a unit comprises all the islands Nicaragua now claims; and the settlement affirms Colombia's sovereignty over that unit. But, even if there were insular territories to the east of the 82° W meridian which the 1928 Treaty did not address *(quod non)*, it cannot be read as an assignment of such Colombian islands to Nicaragua. There is no trace of a basis for such a reading. Nicaragua's elementary mistake is to insist that the Treaty is the sole potential source of Colombia's title. The mistake is all the more striking, in view of Nicaragua's retreat from its earlier *uti possidetis* argument — it simply hovers in the background like a discontented shade. It is striking, too, in view of Nicaragua's failure in these proceedings to adduce a single shred of evidence of historical *effectivités* as against the bulk of the Colombian evidence, spanning all the islands and stretching back through the nineteenth century.

17. It is not only Colombia's titles and practice which Nicaragua ignores. It ignores its own past statements, for example its reaction to the Loubet Award. This was an Award attributing part of the Mosquito Coast to Costa Rica — and recognizing Colombia's sovereignty over "Mangle-Chico, Mangle-Grande, Cayos-de-Albuquerque, San Andrés, Santa-Catalina, Providencia,

[40]RC, pp. 41-44, para. 2.22.

[41]*Ibid.*, and CMC, Ann. 89.

Escudo-de-Veragua, ainsi que toutes autres îles, îlots et bancs relevant de l'ancienne Province de Cartagena, sous la dénomination de canton de San-Andrés"[42]. The Award plainly touched on matters of deep concern to Nicaragua. Nicaragua, unsurprisingly, responded. Its response gave a concise, accurate and considered representation of the islands it understood to be its own, and of the limit beyond which it had no territorial claim[43]. The archipelago — all of the islands comprising it, including all of the islands Nicaragua in the present proceedings now claims — are beyond the limit it then gave.

18. Mr. President, Members of the Court, Nicaragua's territorial claim, both in its original expansionist form and in its contractionist *residuum,* is trivial. It is unsupported by even a shred of evidence of Nicaraguan title. It finds no support in a single *effectivité* on the ground. It is a thoroughly baseless claim. In truth, it is offered as a spurious *quid pro quo* to cover for an absurdly inflated maritime claim — something that we can win. So it is to the absurdly inflated maritime claim that I now turn.

Nicaragua's mutable maritime boundary claim

19. Nicaragua in its Application and Memorial advanced a maritime delimitation claim. But that claim it, in terms, abandoned in the next round of written submissions, as I have said[44]. Instead, in its Reply, Nicaragua said that it had "*decided* that her request to the Court should be for a continental shelf delimitation"[45]. (I like the word "decided" in a Reply. Normally one works out one's claim before bringing the case!) This was not to modify the abandoned claim. It was not to develop it, for example on the basis of newly-adduced evidence. Nicaragua's self-made decision to have a continental shelf delimitation only, was to institute an entirely new claim. The new claim was based on rules that had nothing to do with the original claim, it called for the introduction of evidence which had no bearing on the original claim.

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[42] *Award Relating to the Boundary Dispute between Colombia and Costa Rica*, 11 September 1900, United Nations, *Reports of International Arbitral Awards (RIAA)*, Vol. 28, p. 345.

[43] RC, Vol. II, p. 92, Fig. R-2.1

[44] RN, p. 12, para. 26.

[45] *Ibid.*

20. Mr. President, Members of the Court, in accordance with Article 40, paragraph 1, of the Statute[46], it does not suffice to indicate the subject of the dispute in vague or approximate terms. There must be a degree of precision, and there must be notice of the facts which the Applicant will adduce to support its claim. Nicaragua's Application said nothing — nothing about the law, nothing about the facts — to indicate a claim under the régime of Article 6 of the 1982 Convention, extending well within 200 miles of the Colombian mainland. The claim which Nicaragua introduced in its Reply is inadmissible.

21. But even if this inadmissible claim were to be admitted, it is no more credible than its first, abandoned claim. Nicaragua argues that its continental shelf extends across the Caribbean, in the direction of Colombia's mainland coast, and deeply into its 200-nautical-mile entitlement projecting from that coast[47]. The result is to deny Colombia a substantial portion of its continental shelf and EEZ entitlements generated from its islands and even from its mainland coast[48]. Quite apart from the contradiction between the earlier claim and the new claim, Nicaragua asks the Court to perform a delimitation of the extended continental shelf unlike any yet declared under the rules and procedures of Article 76. No State in the region has yet declared a continental shelf beyond the 200-nautical-mile limit except Nicaragua; there is indeed no maritime area in the Western Caribbean beyond the 200-nautical-mile limit from a coast in which such a claim *could* be declared. As Mr. Bundy will show you, where States have made outer continental shelf submissions to the Annex II Commission, the overwhelming practice has been to restrain these so as to respect the 200-nautical-mile entitlements of other States[49].

22. But even if one sets aside the exorbitant character of Nicaragua's new delimitation claim, there remains the problem of the missing data. Nicaragua adduces scarcely any relevant data to support its claim. What data it did set out it describes as "data . . . *in principle* suitable for inclusion in the [continental shelf] submission"[50]. One might call it "tentative data" — if there is

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[46]*Territorial and Maritime Dispute (Nicaragua* v. *Colombia), Preliminary Objections, Judgment, I.C.J. Reports 2007 (II)*, p. 848, para. 38.

[47]CR 2012/9, pp. 25-34, paras. 24-65 (Lowe).

[48]See RC, Vol. II, p. 96, Fig. R-4.2.

[49]See RC, pp. 149-156, paras. 4.60-4.69; and accompanying figures.

[50]RN, Anns. 1-18, p. 61; emphasis added.

such a thing as "tentative data". What Nicaragua has done so far would not constitute a proper basis for a continental shelf submission to the Annex II Commission. Unless Nicaragua intends to posit the view, as the principal judicial organ, to be considerably less exacting than the members of that Commission when you consider evidence of a claim, tentative data do not establish Nicaragua's case. Absent proof of overlapping potential entitlement, there is no basis for any delimitation.

23. Confronted with these extreme and unsupported maritime claims, Colombia in the present proceedings has set out what it believes, in the proper application of the rules and principles — in particular the principle of equidistance and special circumstances — constitutes an equitable delimitation between the two States in the relevant area. Colombia will first describe the geographic context, identifying the relevant coasts. No coast further than 400 miles from Nicaragua's is relevant, and Colombia's mainland coast is therefore not relevant to these proceedings. The San Andrés Archipelago, by contrast, is absolutely relevant to these proceedings. The archipelago's islands — and this is conceded at least as concerns the three main islands, as I understand it, by Nicaragua, generate the full suite of maritime entitlements, they constitute the other relevant coast.

24. In this context I should say a word about Quitasueño. It forms an integral part of the archipelago. Colombia has administered it as such; third States have understood it that way as well. It is a series of small islands, stretching north to south along a bank 57 km long, fringed by a major reef[51]. Colombia has conducted a detailed survey[52]; and commissioned a second expert to conduct a further survey of Quitasueño[53]. Until this week, Nicaragua had addressed neither the legal case, nor the factual case. I will come back on this tomorrow.

25. Nicaragua attempts to exclude not only Quitasueño as a component of the archipelago[54]; it also denies that the archipelago as a whole constitutes a relevant coast. It thus calls on you, in a

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[51]CMC, Vol. I, para. 2.25.

[52]Study on Quitasueño and Alburquerque prepared by the Colombian Navy, September 2008; CMC, Vol. II-A, Ann. 171.

[53]Expert Report by Dr. Robert Smith, "Mapping the Islands of Quitasueño", February 2010; RC, Vol. II, App. I.

[54]CR 2012/9, pp. 44-58, paras. 19-51 (Oude Elferink).

legal and factual vacuum, to undertake a comprehensive refashioning of the geography. Not a single base point could Mr. Reichler discern, even on San Andrés itself![55]

26. Having identified the relevant coasts and relevant areas bounded by those coasts, Colombia will apply the standard well-known approach to effect a delimitation of overlapping entitlements. The first step is to identify a provisional equidistance line, as measured from appropriate base points. The median line is then considered, in light of relevant circumstances to determine whether its character is overall equitable. In the area which falls to be delimited here, the relevant circumstances include the 82nd W meridian, a fundamental feature of the 1928 settlement, which established a two-way limit to the archipelago. Also relevant is the absence of Nicaragua from the area and the long, consistent and effective presence of Colombia. Maritime delimitation is not a form of natural law, *jus cogens*, which is independent of the conduct of the parties. The recognition of Colombia's sovereignty — and the effect given to the islands — by third States is a further factor, as are patterns of resource use, and, importantly, security considerations. Colombia will submit, in concluding its case on delimitation, that the relevant circumstances confirm the equidistance line between the archipelago and Nicaragua's east-facing coasts — as the equitable delimitation.

27. Mr. President, Members of the Court, you heard on Tuesday a consummate series of presentations seeking to persuade you of the reasonableness of Nicaragua's third maritime mutation. We will respond to these as far as time permits tomorrow, or else next week. Let me just make three points now.

28. My first point is a general observation. It was impossible for my colleagues opposite when discussing delimitation to express themselves in terms that were not question-begging. Let me give you some examples:

29. The Agent (and I must stress that any resemblance between the Agent and Winnie the Pooh is entirely coincidental): "On the question of the islands and other maritime features the only equitable result is enclavement within the continental shelf and Exclusive Economic Zone of Nicaragua if these are found [if these, that is, the islands are found] to appertain to Colombia"[56].

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[55]CR 2012/10, pp. 35-37, paras. 25-31 (Reichler).

[56]CR 2012/8, p. 24, para. 43 (Argüello).

That statement assumes that Nicaragua's maritime zones are prior to the question of sovereignty. But that is wrong.

30. Professor Lowe: "Nicaragua is 'extending' nothing: it is referring, accurately, to the continental shelf that international law has already ascribed to it, no more and no less"[57], and I say so, with respect, a confusing ascription which is a matter for the Court, not a matter for Nicaragua.

31. Professor Pellet:

> «En d'autres termes, ce n'est pas par une opération divine que les îles contestées se trouvent sur le plateau continental du Nicaragua-or indiscutablement elles s'y trouvent: ceci résulte de l'application normale des règles applicables en matière de délimitation maritime dans les circonstances de l'espèce.»[58]

The waters around the islands — up to 12 or 3 miles — are Nicaraguan; we know this because the islands are on the Nicaraguan side of the line; we know where the line belongs, because under "universally admitted rules", Nicaragua's waters extend that far. Thus jurisdiction over the waters springs from jurisdiction over the waters!

32. Mr. Oude Elferink: "as the title and text of the Declaration [made] clear, . . . the declaration of sovereignty was that the banks [were] located on the continental shelf of Nicaragua"[59].

33. The *grundnorm* of the Nicaraguan presence was simple: "all that is Nicaraguan is Nicaraguan, and everything in sight is Nicaraguan". As with other *grundnorms*, it makes sense if you already know the answer to the question; but if you do not, then it is no help at all. The fact that features are located on the Nicaraguan Rise does not make them Nicaraguan: that is a question of law, the product of the delimitation process, not a presupposition.

34. My second point relates to Nicaragua's continental shelf claim to areas within 200 nm of Colombia's mainland coast. Mr. Bundy will discuss this in more detail but I want to make just one point, by reference to the graphic on the screen. [Tab 12 in your folders] In *Libya/Malta* you said, and it has become the foundation of the modern law of delimitation within 200 nm, that geomorphology is irrelevant within 200 nm, and Professor Lowe purported to accept that

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[57]CR 2012/9, p. 31, para. 53 (Lowe).

[58]CR 2012/10, p. 14, para. 15 (Pellet).

[59]CR 2012/9, p. 46, para. 21 (Oude Elferink).

proposition[60]. But only, he said, where the total distance between the opposite coasts was less than twice the distance of the EEZ, i.e., 400 nm. In Nicaragua's case, he said, there was already a Nicaraguan continental shelf beyond 200 nm which was there *ab initio*, without claim, without apparently anything but the operation of international law, subject to delimitation, that shelf could keep going until it reached the Article 76 limit, even though this might be well within the 200 nm zone of the other coastal State[61]. I hope I have understood him properly. But this gives rise to a paradox which the graphic on the screen demonstrates. Take two opposite coastal States, A and B. State A has as geomorphological continental shelf which stops well within State B's EEZ. State B has no physical shelf or a very small one. If the distance between State A and State B is less than 400 nm, Professor Lowe accepts the teaching of *Libya/Malta*: geomorphology is irrelevant and the continental shelf is the median line. This is the lower drawing on the screen. But if the distance between the two is greater than 400 nm, geomorphology trumps and the continental shelf of State A keeps going in accordance with Article 76 (4) and (5), impinging drastically on State B. Thus State A has a larger continental shelf if it is further away. Apparently absence makes the shelf grow longer, which is absurd. You will have heard of the Baxter paradox; this is the Lowe paradox. But unlike the Baxter paradox, which expresses a fundamental truth, the Lowe paradox only obtains if he is right in his narrow, contorted reading of *Libya/Malta*, and he is not right. No State in the Western Caribbean except Nicaragua thinks there is any space for an extended continental shelf within 200 nm of other coasts. That is why none of us have made claims to the Annex 2 Commission.

35. I turn to Nicaragua's EEZ claim, as ably described by Mr. Reichler. He accused us of not doing a proportionality analysis but, until Tuesday, they had not done one either, and they still have not done one for the continental shelf. But he did one for the EEZ: you remember, ratio of coastal lengths 1:21; ratio of maritime areas 1:35 in favour of Nicaragua, result — a rather charitable result we thought — equity[62]. He thus produced the remarkable effect of reversing the effect of offshore islands versus mainland coasts of which Professor Lowe complained so bitterly,

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[60]*Ibid.*, pp. 29-30, paras. 43-45 (Lowe).

[61]CR 2012/9, p. 30, paras. 46-48 (Lowe).

[62]CR 2012/10, p. 48, para. 57 (Reichler).

by reference to this podium — we can call it the podium effect. A small feature offshore will have a greater effect than a coastal frontage. That is a geometrical fact. Professor Lowe complained about it — Mr. Reichler reversed it.

36. On the screen is his "equitable solution": coastal ratio, 1:21, area ratio 1:35. How did he get that? Well he only counted the west-facing coasts of the three main islands, and this even though the delimitation area includes EEZ generated by their east-facing coasts. In fact, unlike this podium, which radiates only in a single direction, coasts radiate and, in particular, islands radiate in all directions and the EEZ areas around the archipelago arise from the circumference of the islands, not from a single west-facing frontage. You see now a table of the total coastal lengths — you saw it again and you will see it now — of the archipelago's islands. We have left Quitasueño out in order not to be tendentious as, if we added Quitasueño, the ratio would be transformed. But it is transformed already. The total coastal lengths of the archipelago's islands comes to nearly 74 km. The ratio relative to the Nicaraguan mainland coast is about 6.1:1. And even if we take only the coastal lengths of the three main islands, which is 62.2 km, the ratio is about 7:1. Nothing like 20:1. On this basis, Mr. Reichler justifies an area ratio of 35:1 in favour of Nicaragua! Obviously and manifestly inequitable.

37. Let me illustrate the outcome of this glaring inequity in several more ratios. First there is the ratio of EEZ areas attributed to the Parties. You can see it on the screen:

EEZ areas attributed by Nicaragua to Nicaragua:	186,362 sq km
EEZ attributed by Nicaragua to Colombia:	0 sq km
Area ratio:	Infinity

38. There is another aspect. Here is Mr. Reichler's area of potential EEZ entitlements. You notice the area in pink, to the east. A very important area. It is putative EEZ of the archipelago which is beyond the 200 nm line from Nicaragua's coasts and therefore cannot be claimed as EEZ by Nicaragua. That area of 35,645 sq km is not gained by Nicaragua but it is lost by Colombia. It becomes high seas. What is the ratio of EEZ areas lost by the Parties? Here's that ratio again:

EEZ areas lost by Nicaragua by reason of the archipelago:	0 sq km
EEZ areas lost by the archipelago by reason of Nicaragua:	35,456 sq km
Area ratio of areas lost:	Infinity

39. So this is equity according to Nicaragua — a modest proposal!

Nicaragua's demand for reparation

40. Mr. President, Members of the Court, finally there is Nicaragua's demand for reparation, now only satisfaction[63]. It can be answered succinctly. You have never held a party internationally responsible simply for maintaining a maritime claim[64]. You have refused in the past to grant a declaration when a party has asked for "an all-embracing finding of liability which would cover matters as to which [the Court] has only limited information and slender evidence" (*Fisheries Jurisdiction (Federal Republic of Germany* v. *Iceland), Merits, Judgment, I.C.J. Reports 1974,* p. 205, para. 76). Nicaragua has failed even to attempt to substantiate its claim for a declaration. Moreover you have made it clear — for example, in *Cameroon/Nigeria* — that you do not like territorial disputes being infected by responsibility claims[65]. This aspect of Nicaragua's case is also without foundation.

41. Mr. President, Members of the Court, this concludes the general overview of Colombia's case. I would ask you now, Mr. President, that you call on my colleague, Professor Kohen, who will address Colombia's title to the other islands which comprise the archipelago. Thank you, Mr. President, Members of the Court.

The PRESIDENT: Thank you, Professor Crawford. Je passe maintenant la parole à M. le professeur Kohen. Vous avez la parole, Monsieur.

M. KOHEN :

LA REVENDICATION ARTIFICIELLE NICARAGUAYENNE FACE À LA SOUVERAINETÉ TERRITORIALE INCONTESTABLE DE LA COLOMBIE SUR LES CAYES

1. Monsieur le président, Mesdames et Messieurs les juges, c'est un honneur de comparaître à nouveau devant votre haute juridiction, pour défendre les droits de la Colombie. Il m'incombe d'examiner ce qui reste de la revendication territoriale nicaraguayenne à la lumière de la souveraineté que la Colombie détient et exerce sur l'ensemble des cayes depuis son indépendance

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[63]RN, pp. 235-238.

[64]*Territorial and Maritime Dispute (Nicaragua* v. *Colombia), Preliminary Objections, Judgment, I.C.J. Reports 2007 (II)*, p. 934; declaration of Judge *ad hoc* Gaja.

[65]*Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria: Equatorial Guinea intervening), Judgment, I.C.J. Reports 2002,* pp. 448-453, paras. 308-324; esp. p. 452, para. 319.

en vertu de l'*uti possidetis juris*. Cela doit être réalisé essentiellement à partir de l'instrument fondamental qui régit la question : le traité de 1928 et le protocole de ratification de 1930.

2. Ma tâche consistera essentiellement à vous exposer l'interprétation de cet ensemble conventionnel qui a permis de trancher *définitivement* le différend territorial opposant la Colombie au Nicaragua. J'aborderai quatre questions. *Primo,* le fait que le traité de 1928-1930 règle tous les conflits territoriaux qui ont pu exister entre les parties. *Secundo,* la détermination de l'étendue des reconnaissances mutuelles, sur la base de l'article premier du traité de 1928. *Tertio,* la portée de la limite du 82e méridien établie par le protocole de 1930. *Quarto,* la situation particulière de Roncador, Quitasueño et Serrana à la lumière du deuxième paragraphe de l'article premier du traité de 1928.

3. Une précision terminologique tout d'abord. Sauf indication contraire, j'utiliserai la formule générique plurielle «les cayes» pour me référer aux formations insulaires sur lesquelles votre Cour doit se prononcer, c'est-à-dire Alburquerque, Est-Sud-Est, Roncador, Serrana, Quitasueño, Serranilla, Bajo Nuevo et toutes les formations maritimes qui y sont rattachées.

4. Je vais montrer que toutes les cayes font partie de l'archipel de San Andrés et, par conséquent, relèvent de la souveraineté colombienne. A vrai dire, il ne s'agira pas d'une tâche extrêmement compliquée. Mais avant d'interpréter la portée du traité de 1928-1930, permettez-moi, Monsieur le président, une brève référence à l'origine de la souveraineté colombienne, durant la période coloniale espagnole, ainsi qu'à la période de l'indépendance précédant l'adoption du traité de 1928.

A. L'*uti possidetis juris* et la pratique des Etats après l'indépendance montrent que les cayes font partie de l'archipel de San Andrés

5. La source de la souveraineté colombienne sur l'archipel de San Andrés est à rechercher dans le décret royal de 1803, auquel votre Cour s'est déjà référé dans l'arrêt en l'affaire *Nicaragua c. Honduras*[66]. Ce décret a restauré — à la demande de la population de San Andrés — la juridiction de la vice-royauté de Santa Fé, ou Nouvelle-Grenade, sur l'archipel, ainsi que sur la côte des Mosquitos. Le croquis que vous voyez à l'écran montre l'étendue de la vice-royauté de

[66] *Différend territorial et maritime entre le Nicaragua et le Honduras dans la mer des Caraïbes (Nicaragua c. Honduras), arrêt, C.I.J. Recueil 2007 (II)*, p. 709, par. 161.

Santa Fé, ou Nouvelle-Grenade, la division administrative coloniale à partir de laquelle est née la République de Colombie. Telle était la situation existante en 1810, quand le peuple de la vice-royauté de Santa Fé ou Nouvelle-Grenade entama son processus d'indépendance. En vertu de l'*uti possidetis juris*, l'archipel devint colombien. Depuis l'indépendance, la Colombie a exercé de manière continue sa souveraineté sur l'ensemble de l'archipel[67], ce qu'elle fait encore aujourd'hui, à l'exception des îles Mangles (Corn Islands).

6. Pour le Nicaragua, à l'époque de l'indépendance, l'archipel comprenait uniquement les îles de San Andrés, Providencia, Santa Catalina et Mangles et leurs îlots alentours[68]. Les cayes, à en croire aussi le Nicaragua, ne faisaient pas partie de l'archipel mais tombaient sous la souveraineté nicaraguayenne, tout comme l'archipel lui-même. Comme nous le verrons, rien ne permet de justifier cette interprétation, fabriquée pour les besoins des plaidoiries.

7. Permettez-moi, Mesdames et Messieurs les juges, de mentionner quatre éléments factuels qui me semblent incontestés et qui apportent un éclaircissement sur la question de savoir quelle était la division administrative qui, au moment de l'indépendance, exerçait la juridiction sur les cayes. *Premièrement,* les Parties conviennent que toutes les cayes relevaient de la souveraineté espagnole à l'époque coloniale. *Deuxièmement,* il n'est point contesté qu'une autorité espagnole était établie sur l'île de San Andrés[69]. *Troisièmement,* il n'y a aucun désaccord sur le fait que ces cayes aient fait l'objet de relevés spécifiques et de visites par des agents de la couronne espagnole, à travers la vice-royauté de la Nouvelle-Grenade[70]. *Quatrièmement,* il est aussi incontesté qu'il n'y avait pas d'autorité espagnole établie sur la côte des Mosquitos, l'Espagne n'y exerçait pas de véritable contrôle effectif[71]. La réplique nicaraguayenne admet que les deux principaux postes appartenant à l'Espagne dans la mer des Caraïbes, entre lesquels se trouvaient les cayes, étaient La Havane et Cartagena de Indias[72]. Durant la période précédant l'indépendance, les activités

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[67] CMC, p. 88-146, par. 3.15-3.151.

[68] RN, p. 40, par. 1.52, p. 41, par. 1.55, p. 48, par. 1.75.

[69] MN, p. 38, par. 1.67 et p. 125, par. 2.141 ; CMC, p. 83, par. 3.7, p. 86-87, par. 3.12, p. 88, par. 3.15-3.16 ; RN, p. 40, par. 1.52.

[70] CMC, p. 39-42, par. 2.41-2.44 ; RN, p. 41-42, par. 1.56-1.59.

[71] Rapport de la junte des fortifications et de défense des Indes, Madrid, 21 octobre 1803, MN, vol. II, annexe 5 ; CMC, vol. II-A, annexe 21.

[72] RN, p. 42, par. 1.59.

espagnoles en lien avec les cayes avaient pour origine, soit Cartagena, soit l'île de San Andrés elle-même, mais n'étaient jamais rattachées au Nicaragua, qui était une province de la côte du Pacifique de la capitainerie générale de Guatemala.

8. Après l'indépendance, le Nicaragua n'a pas formulé de revendication à l'égard des cayes qui sont soumises à votre considération, et ceci jusqu'en 1913, date à laquelle il revendiqua l'ensemble de l'archipel de San Andrés. Selon son conseil, «[c]e n'est qu'alors une fois établi sur la côte atlantique que le Nicaragua a pu mettre les îles adjacentes en point de mire»[73].

9. Comme on le sait, le président français Emile Loubet rendît une sentence arbitrale le 11 septembre 1900 relative au différend territorial entre le Costa Rica et la Colombie. La partie pertinente se lit comme suit :

> «Quant aux îles les plus éloignées du continent et comprises entre la côte de Mosquitos et l'Isthme de Panama, nommément : Mangle-Chico, Mangle-Grande, Cayos-de-Albuquerque, San Andrès, Santa-Catalina, Providencia, Escudo-de-Veragua, ainsi que toutes autres îles, îlots et bancs relevant de l'ancienne Province de Cartagena, sous la dénomination de canton de San-Andrès, il est entendu que le territoire de ces îles, sans en excepter aucune, appartient aux Etats-Unis de Colombie.»[74]

10. Le Nicaragua a protesté contre cette reconnaissance, uniquement à l'égard des formations qu'il considérait comme relevant de sa souveraineté. Regardons-les à l'écran. Il s'agissait des îles Mangles et des îlots et cayes situés entre les 11e et 15e parallèles de latitude nord et le méridien équivalent à 82° 09' 45" de Greenwich[75]. A l'évidence, cela n'inclut donc aucune des cayes qu'il revendique aujourd'hui et qui avaient été reconnues comme colombiennes par le président Loubet, et qui se trouvent hors des lignes d'attribution désignées avec beaucoup de précision par le Nicaragua lui-même.

11. En revanche, à cette époque, la position colombienne relative à l'étendue de l'archipel de San Andrés et à sa souveraineté sur l'ensemble des îles et cayes qui les constituent était

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[73] CR 2012/8, p. 35, par. 12 (Remiro).

[74] *Sentence arbitrale relative au différend frontalier entre la Colombie et le Costa Rica, 11 septembre 1900,* Nations Unies, *RSA*, vol. 28, p. 345.

[75] Note diplomatique en date du 22 septembre 1900 adressée au ministre français des affaires étrangères, M. Delcassé, par le ministre nicaraguayen à Paris, M. Crisanto Medina, CMC, annexes, vol. II-A, annexe 32.

parfaitement établie. Pour preuve, cette position fut reconnue par des Etats tiers, comme par exemple la Grande-Bretagne en 1874 et par la suite, par tous les Etats voisins et autres Etats[76].

12. Dans le contexte de l'occupation par la force des îles Mangles par le Nicaragua en 1890, le ministre colombien des affaires étrangères, Jorge Holguín, déclara ceci devant le Congrès :

> «La Colombie a soutenu, soutient et continuera de soutenir, jusqu'à la fin des temps, que les îles de l'archipel de San Andrés, comprenant trois groupes d'îles s'étendant des côtes de l'Amérique centrale, en face du Nicaragua, du caye de Serranilla entre 15° 52' de latitude nord et 80° 20' de latitude ouest du méridien de Greenwich, sont de sa propriété et lui appartiennent par voie de succession, en vertu de l'*uti possidetis* de 1810. Le premier de ces groupes est constitué par les îles de Providencia et Santa Catalina et les cayes Roncador, Quitasueño, Serrana, Serranilla et Bajo Nuevo ; le deuxième comprend les îles de San Andrés et les cayes d'Alburquerque, Courtown Bank [c'est-à-dire les cayes est-sud-est] et d'autres cayes de moindre importance ; et le troisième groupe est composé des îles de San Louis de Mangle, et notamment Mangle Grande, Mangle Chico et les cayes de Las Perlas, ainsi que la côte de Mosquitos.»[77]

13. Ce rapport au Congrès, daté de 1896, fut reproduit dans les *Annales diplomatiques et consulaires de la Colombie* en 1914, c'est-à-dire immédiatement après la première revendication nicaraguayenne sur l'ensemble de l'archipel de San Andrés en 1913. Ce document émane d'une autorité publique capable d'engager internationalement la Colombie, est produit dans le contexte du différend territorial qui l'opposa au Nicaragua et doté d'une large publicité. Le Nicaragua n'ignorait pas la manière dont la Colombie appréciait l'étendue de l'archipel.

14. Durant toute la procédure, le Nicaragua est resté remarquablement silencieux sur ces deux documents fondamentaux : sa réponse à Loubet et la description Holguín. Ce silence s'explique : les prétentions insulaires de chaque Partie ressortent sans aucune ambiguïté.

15. La pratique durant l'époque considérée montre sans l'ombre d'un doute que les cayes en question étaient considérées comme faisant partie de l'archipel de San Andrés. Mon collègue, Me Bundy, abordera cette question. Que trouve-t-on du côté nicaraguayen ? L'absence totale de revendication individuelle sur ces cayes, avant ou durant la conclusion du traité, et pendant des décennies après son entrée en vigueur. A vrai dire, il y a eu plutôt silence nicaraguayen face aux actes colombiens et des Etats tiers qui appelaient pourtant une réaction, alors que la Colombie

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[76] CMC, p. 47-48, par. 2.50-2.52, p. 189-201, par. 4.78-4.102, p. 220-238, par. 4.140-4.188.

[77] *Ibid.*, p. 52, par. 2.59 et annexe 89.

défendait sa souveraineté face à des activités états-uniennes et britanniques sur ces cayes[78]. Cette attitude s'oppose clairement aux protestations nicaraguayennes lorsqu'il fut question d'activités de sujets britanniques sur les cayes Miskitos et Morrison[79]. Le Nicaragua savait donc parfaitement ce qu'il devait faire, s'il se considérait souverain sur les cayes qu'il revendique aujourd'hui. Et pourtant, il n'a rien fait. Il a laissé faire la Colombie, le seul des deux Etats qui se considérait souverain et qui s'est comporté comme tel. *«Qui tacet consentire videtur.»*[80]

16. Pour résumer, Mesdames et Messieurs les juges :

- le décret royal de 1803,
- la présence effective sur l'archipel d'une administration dépendante de la vice-royauté de la Nouvelle-Grenade (ou Santa Fé) dans un premier temps et de la Colombie indépendante ensuite, exerçant des actes d'autorité relatifs aux cayes,
- l'absence totale de contestation de cette situation par le Nicaragua, exception faite relativement aux îles Mangles à la fin du XIXe siècle,
- le fait que seule la Colombie ait réagi face à des activités ou des revendications émises par d'autres puissances à l'égard de certaines cayes,
- les positions publiques affichées aussi bien par la Colombie que par le Nicaragua,

révèlent, qu'au moment où le Nicaragua décida en 1913 de revendiquer pour la première fois l'ensemble de l'archipel de San Andrés, celui-ci comprenait toutes les cayes et que la Colombie fut pendant un siècle le seul des deux Etats à réclamer la souveraineté sur ces cayes et à agir en tant que souverain.

Le PRESIDENT : Je m'excuse, Monsieur le professeur, de vous interrompre, mais je crois que c'est le moment opportun de déclarer traditionnellement une pause-café de quinze minutes. L'audience est suspendue pour quinze minutes.

L'audience est suspendue de 16 h 20 à 16 h 40.

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[78] CMC, p. 150-170, par. 4.3-4.47, p. 193-204, par. 4.86-4.110.

[79] *Ibid.*, p. 201-203, par. 4.103-4.108.

[80] Affaire du *Temple de Préah Vihéar (Cambodge c. Thaïlande), fond, arrêt, C.I.J. Recueil 1962*, p. 23.

Le PRESIDENT : Veuillez vous asseoir. L'audience est rouverte, et la parole est à vous, M. Kohen.

M. KOHEN : Merci, Monsieur le président.

B. L'interprétation du traité de 1928-1930 permet le règlement du différend territorial

17. Monsieur le président, je viens maintenant à l'interprétation des dispositions pertinentes du traité, en suivant pour cela les règles énoncées à l'article 31 de la convention de Vienne sur le droit des traités, expression du droit coutumier[81].

18. Une première question, soulevée par la position nicaraguayenne, a trait au fait de savoir si le traité de 1928-1930 a laissé pendant un éventuel différend territorial entre les deux pays. Le traité de 1928 est dépourvu d'ambiguïté. Son texte commence par la phrase suivante : «La République de Colombie et la République du Nicaragua, désireuses de mettre un terme au conflit territorial pendant entre elles et de resserrer les liens traditionnels d'amitié qui les unissent, ont décidé de conclure le présent traité»[82].

19. «Mettre un terme au conflit territorial» signifie, ni plus ni moins, qu'après l'entrée en vigueur du traité de 1928-1930, tout conflit territorial entre les deux Etats était désormais réglé. Il n'existait donc plus de différend territorial. Votre jurisprudence étaye sans l'ombre d'un doute cette interprétation[83].

20. L'interprétation qu'avance aujourd'hui le demandeur présuppose que les Parties auraient laissé dans le flou l'appartenance des cayes en 1928-1930. Selon son conseil lundi, «ce conflit

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[81] *Différend territorial (Jamahiriya arabe libyenne/Tchad), arrêt, C.I.J. Recueil 1994,* p. 21, par. 41 ; *Délimitation maritime et questions territoriales entre Qatar et Bahreïn (Qatar c. Bahreïn), compétence et recevabilité, arrêt, C.I.J. Recueil 1995,* p. 18, par. 33 ; *Plates-formes pétrolières (République islamique d'Iran c. Etats-Unis d'Amérique), exception préliminaire, arrêt, C.I.J. Recueil 1996 (II),* p. 812, par. 23 ; *Incident aérien du 10 août 1999 (Pakistan c. Inde), compétence de la Cour, arrêt, C.I.J. Recueil 2000,* p. 1059, par. 18 ; *LaGrand (Allemagne c. Etats-Unis d'Amérique), arrêt, C.I.J. Recueil 2001,* p. 501, par. 99 ; *Souveraineté sur Pulau Ligitan et Pulau Sipadan (Indonésie/Malaisie), arrêt, C.I.J. Recueil 2002,* p. 645, par. 37 ; *Conséquences juridiques de l'édification d'un mur dans le territoire palestinien occupé, avis consultatif du 9 juillet 2004, C.I.J. Recueil 2004 (I),* p. 174, par. 94 ; *Licéité de l'emploi de la force (Serbie-et-Monténégro c. Belgique), exceptions préliminaires, arrêt, C.I.J. Recueil 2004 (I),* p. 318, par. 100.

[82] Traité de règlement territorial entre la Colombie et le Nicaragua, 24 mars 1928, MN, vol. II, annexe 19 ; CMC, vol. II-A, annexe 1 ; *C.I.J. Recueil 2007*, p. 842, par. 18.

[83] Affaire relative à la *Souveraineté sur certaines parcelles frontalières (Belgique/Pays-Bas), arrêt, C.I.J. Recueil 1959,* p. 221-222, cité aussi dans *Différend territorial (Jamahiriya arabe libyenne/Tchad), arrêt, C.I.J. Recueil 1994,* p. 24, par. 47. Cf. aussi *Interprétation de l'article 3, paragraphe 2, du traité de Lausanne, avis consultatif, 1925, C.P.J.I. série B n° 12*, p. 20 ; *Jaworzina, avis consultatif, 1923, C.P.J.I. série B n° 8,* p. 28.

territorial ne portait pas, d'une manière indifférenciée et vague, sur toutes les îles de la mer des Caraïbes»[84]. Mais, Monsieur le président, non seulement la Colombie revendiquait et exerçait sa souveraineté sur les cayes à l'époque de la conclusion du traité de 1928-1930, mais encore elle les considérait explicitement comme faisant partie de l'archipel de San Andrés. Pour sa part, le Nicaragua n'avait, hormis les îles Mangles, jamais — je le répète, jamais — émis de revendication individuelle sur ces cayes et n'y a jamais exercé la moindre effectivité. De deux choses l'une : soit le Nicaragua revendiquait les cayes parce qu'elles faisaient partie de l'archipel, soit il n'y avait pas de différend parce que le Nicaragua ne les revendiquait pas face à la souveraineté colombienne clairement affichée. Nos collègues de l'autre côté de la barre ne peuvent pas échapper à ce dilemme.

21. Livrons-nous malgré tout, Monsieur le président, à l'analyse des contorsions juridiques faites par le demandeur pour maintenir formellement une revendication à laquelle, *manifestement*, il n'y croit plus, à supposer même qu'il y ait auparavant cru un seul instant. Selon le Nicaragua, l'archipel de San Andrés comprend uniquement les trois îles principales nommées à l'article premier du traité de 1928 et les îlots à proximité qui les entourent. «A l'inverse [je cite le conseil nicaraguayen], sur la base aussi de cet instrument, toutes les formations maritimes *ne faisant pas partie dudit archipel* relèvent du Nicaragua comme dépendances de la côte des Mosquitos.»[85] Voici un *non sequitur* typique, qui évidemment ne trouve pas la moindre justification dans l'interprétation du traité.

22. Examinons alors ce que les parties se sont réellement concédées lors de la conclusion du traité de 1928-1930. Je cite le premier paragraphe de l'article premier :

> «La République de Colombie reconnaît la souveraineté pleine et entière de la République du Nicaragua sur la côte de Mosquitos, comprise entre le cap de Gracias a Dios et la rivière San Juan, et sur les îles Mangle Grande et Mangle Chico dans l'océan Atlantique (Great Corn Island et Little Corn Island). La République du Nicaragua reconnaît la souveraineté pleine et entière de la République de Colombie sur les îles de San Andrés, de Providencia, de Santa Catalina, et sur les autres îles, îlots et cayes qui font partie de l'archipel de San Andrés.»

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[84] CR 2012/8, p. 62, par. 38 (Pellet).

[85] *Ibid.*, p. 34, par. 7 (Remiro). RN, p. 55, par. 1.97.

23. Je m'arrête un instant sur l'emploi du verbe «reconnaître» et sur sa portée juridique. Je cite votre arrêt en l'affaire *Libye/Tchad* : «Reconnaître une frontière, c'est avant tout «accepter» cette frontière, c'est-à-dire tirer les conséquences juridiques de son existence, la respecter et renoncer à la contester pour l'avenir.»[86] Bien entendu, ce qui est valide pour une frontière établie par un traité l'est également pour la souveraineté sur une bande de territoire ou sur des îles. Le comportement du Nicaragua est un exemple flagrant du non-respect de cette reconnaissance solennelle inscrite dans un traité territorial.

24. J'en viens maintenant à l'étendue territoriale des reconnaissances faites par les deux Parties. Lundi, le conseil du Nicaragua mentionna une note que le ministre colombien à Managua, Manuel Esguerra, a transmise en 1927 à son ministère et à la légation de son pays à Washington[87]. Le conseil a oublié un petit détail que l'on trouve dans le même paragraphe qu'il a cité. Après avoir mentionné que le Nicaragua revendiquait l'ensemble de l'archipel de San Andrés, M. Esguerra, le ministre colombien à Managua, affirma :

> «[C]omme vous n'êtes pas sans le savoir, cet archipel se compose des îles de San Andrés, Providencia, Santa Catalina, Great Corn Island et Little Corn Island, et des cayes d'Alburquerque, Cowton [Courtown, Est-Sud-Est], Roncador, Quitasueño, Serrana, Serranilla, Bajo Nuevo et Morrison.» *[Traduction du Greffe.]*[88]

Il s'agit ni plus ni moins, Mesdames et Messieurs les juges, de celui qui a négocié et signé le traité de 1928. Y a-t-il la moindre ambiguïté, Monsieur le président, quant à l'appartenance des cayes — de toutes les cayes — à l'archipel de San Andrés ?

25. La Colombie a démontré que les cayes font partie de l'archipel et qu'elle les a toujours administrées, aussi bien avant qu'après la signature et l'entrée en vigueur du traité de 1928-1930. Les preuves sont nombreuses et dépourvues d'ambiguïté[89]. En fait, je pourrais arrêter mon analyse ici. Par souci de complétude, je vais expliquer maintenant que l'expression «la côte de

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[86] *Différend territorial (Jamahiriya arabe libyenne/Tchad), arrêt, C.I.J. Recueil 1994,* p. 22, par. 42. [Texte en anglais] : «To recognize a frontier is essentially to "accept" that frontier, that is, to draw legal consequences from its existence, to respect it and to renounce the right to contest it in future».

[87] CR 2008/8, p. 36, par. 19 (Remiro).

[88] CMC, vol. II-A, p. 399, annexe 112. Texte en anglais : «— as you are aware of — this Archipelago is formed by the islands of San Andrés, Providencia, Santa Catalina, Great Corn Island and Little Corn Island, and the cays of Alburquerque, Cowton [Courtown], Roncador, Quitasueño, Serrana, Serranilla, Bajo Nuevo and Morrison».

[89] CMC, p. 36-75, par. 2.32-2.98, p. 91-147, par. 3.24-3.156 ; DC, p. 77-82, par. 2.86-2.91.

Mosquitos», telle qu'elle apparaît à l'article premier, ne peut aucunement inclure les cayes qui feront l'objet de votre décision[90]. J'avance quatre raisons fondamentales.

26. *Premièrement,* il suffirait de dire que le substantif «côte» peut difficilement remplacer les termes «îles, îlots et cayes» lorsqu'il s'agit précisément de définir des îles, des îlots et des cayes. *Deuxièmement,* comment pourrait-on inclure dans l'expression «côte des Mosquitos» des cayes se situant jusqu'à plus de deux cent mille marins de la côte, alors que le traité lui-même parle de la souveraineté nicaraguayenne sur «la côte de Mosquitos … et sur les îles Mangle Grande et Mangle Chico sur l'océan Atlantique» ? En effet, il semble peu raisonnable de citer nommément des îles qui sont plus proches de la côte (et pour lesquelles les idées de «dépendance», d'«adjacence» ou de «proximité» pourraient être plus aisément appliquées) et de ne pas le faire pour des îles qui se situent beaucoup plus loin «dans l'océan Atlantique». *Troisièmement,* le Nicaragua a émis des revendications sur les îles Mangles et les a occupées en 1890, malgré les protestations colombiennes, étant donné qu'elles faisaient partie de l'archipel[91]. Si le Nicaragua avait eu des visées sur les cayes qu'il revendique aujourd'hui, pourquoi n'a-t-il rien fait, rien réclamé ? Lundi, son conseil a affirmé que «[l]e Nicaragua n'avait pas d'autres moyens que la protestation»[92]. Soit. Alors, où sont les protestations ou les revendications du Nicaragua à l'égard d'Alburquerque ? d'Est-Sud-Est ? de Roncador ? de Quitasueño ? de Serrana ? de Serranilla ? de Bajo Nuevo ? *Quatrièmement,* le Nicaragua ne peut pas soutenir une interprétation extensive de l'expression «côte des Mosquitos et îles Mangles» et une interprétation restrictive d'une expression qui par définition se veut extensive : «les îles de San Andrés, de Providencia, de Santa Catalina, et sur les autres îles, îlots et cayes qui font partie de l'archipel de San Andrés».

27. Monsieur le président, je n'ai pas besoin de réfuter les arguments du Nicaragua relatifs à la souveraineté qui découlerait de la proximité des cayes aux côtes ou à leur présence sur le prétendu plateau continental nicaraguayen[93]. Votre Cour a déjà rejeté la revendication de proximité ou d'adjacence des côtes dans la même région des Caraïbes. Vous avez considéré que

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[90] RN, p. 29 et 55, par. 1.20 et 1.96.

[91] Note diplomatique en date du 5 novembre 1890 adressée au ministre nicaraguayen des affaires étrangères par le ministre colombien des affaires étrangères ; EPC, vol. II, annexe 3.

[92] CR 2012/8, p. 47, par. 74 (Remiro).

[93] DC, vol. I, p. 44-58, par. 2.23-2.51 et p. 70-74, par. 2.70-2.79.

les cayes contestées entre le Honduras et le Nicaragua «sont situées très loin au large et ne sont manifestement pas adjacentes à la côte continentale du Nicaragua ou du Honduras»[94]. Les cayes en question sont situées entre 27 et 41 milles marins de la frontière terrestre entre le Honduras et le Nicaragua. Que dire alors des cayes, dont la plus proche de la côte des Mosquitos (Alburquerque) est située à 106 milles et la plus éloignée (Bajo Nuevo) à 266 milles marins et sur lesquelles, à la différence de celles de l'affaire entre le Nicaragua et le Honduras, ont été soumises à l'administration effective d'un autre Etat depuis l'indépendance ? Par ailleurs, l'argument en vertu duquel les cayes seraient situées sur le plateau continental, constituant le prolongement de la côte des Mosquitos, a aussi été rejeté par la Cour. Votre jurisprudence a, à plusieurs reprises, confirmé que «la terre domine la mer»[95] ; par conséquent, c'est le territoire qui génère un titre sur le plateau continental et non vice versa.

28. Monsieur le président, Mesdames et Messieurs les juges, la Colombie a déjà amplement démontré que ces cayes étaient administrées par la Colombie. Qui plus est, lorsque la côte des Mosquitos se trouvait effectivement sous protectorat britannique, non seulement il n'y a pas eu de revendication britannique sur les cayes, mais au contraire il y a bien eu reconnaissance britannique de la souveraineté colombienne sur celles-ci[96].

29. La cartographie, tant des deux Parties que celle des tiers, confirme amplement la position de la Colombie[97]. Je me concentrerai sur les cartes officielles colombiennes établies juste avant et tout de suite après la conclusion du traité de 1928-30. Vous avez à l'écran une carte de la Colombie de 1920, incluant un encart dont le titre est — je traduis — «Encart [«Cartela» en espagnol] de l'archipel de San Andrés et Providencia appartenant à la République de Colombie», montrant les cayes dont le Nicaragua semble aujourd'hui ignorer qu'elles font partie de l'archipel[98]. Vous voyez maintenant une carte officielle similaire, mais datant de 1931,

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[94] *Différend territorial et maritime entre le Nicaragua et le Honduras dans la mer des Caraïbes (Nicaragua c. Honduras), arrêt, C.I.J. Recueil 2007 (II)*, p. 709, par. 163.

[95] *Délimitation maritime et questions territoriales entre Qatar et Bahreïn (Qatar c. Bahreïn), arrêt, C.I.J. Recueil 2001*, p. 97, par. 185 ; *Différend territorial et maritime entre le Nicaragua et le Honduras dans la mer des Caraïbes (Nicaragua c. Honduras), arrêt, C.I.J. Recueil 2007 (II)*, p. 696, par. 113.

[96] CMC, p. 189-190, par. 7.78-7.93.

[97] *Ibid.*, p. 60-74, par. 2.78-2.97.

[98] *Ibid.*, fig. 2.11 et 2.13.

c'est-à-dire, quelques mois après l'entrée en vigueur du traité de 1928-30. Vous trouvez à nouveau un «Encart de l'archipel de San Andrés et Providencia appartenant à la République de Colombie» au sein duquel toutes les cayes en question sont incluses. La seule différence notoire est que cette carte identifie le 82e méridien et que les mots «République de Nicaragua» sont ajoutés à l'ouest du méridien. Clairement, cette carte est une interprétation graphique probante de l'arrangement conventionnel entre la Colombie et le Nicaragua de 1928-30. A nouveau, aucune réaction du côté nicaraguayen. Lundi, le conseil du Nicaragua a utilisé une carte similaire, mais datée de 1951[99]. Il est allé chercher l'aiguille dans un bazar, mais n'a pas vu l'éléphant qui s'y trouvait. Il s'est focalisé sur l'endroit où apparaissent les noms des Etats à l'est et à l'ouest du 82e méridien, mais n'a pas vu que l'encart contient sous le titre «Cartela del Archipiélago de San Andrés y Providencia» toutes les cayes que le Nicaragua affirme qu'elles ne font pas partie de l'archipel. Les encarts de ces cartes sont tous semblables. Celui de la carte de 1920 montre les îles Mangles comme tombant sous la souveraineté colombienne. Face au titre des encarts dépourvu de toute ambiguïté, l'exercice cartographique de notre contradicteur, même si imaginatif, s'avère totalement inutile. Pour que son argument puisse être crédible, les encarts auraient dû se limiter à la partie qu'il a zoomée devant votre Cour et qui correspond au 1/16e de son contenu véritable. Malheureusement pour le demandeur, ils couvrent vraiment et sans l'ombre d'un doute toutes les cayes.

30. Côté nicaraguayen en fait, il n'y a rien, absolument rien, qui vienne soutenir une quelconque revendication à l'encontre de ces cayes. C'est seulement en 1972 que l'on trouve une première revendication relative à Roncador, Quitasueño et Serrana (après avoir avancé des revendications sur le plateau continental près de Quitasueño en 1969), et en 1980 sur d'autres cayes dans le «livre blanc», sans jamais les nommer, mais définies comme «territoires circonvoisins («territorios circundantes») de San Andrés et Providencia»[100]. Le Nicaragua s'appuyait alors sur la prétendue nullité du traité de 1928-30 et sur la prétendue appartenance des cayes au plateau continental, soi-disant nicaraguayen.

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[99] CR 2012/8, p. 55, par. 20 (Pellet).

[100] «Déclaration sur les îles de San Andrés, Providencia et territories circonvoisins» de la Junte de gouvernement de reconstruction nationale du Nicaragua, 4 février 1980, *in* Nicaragua, ministère des affaires étrangères, livre blanc (*Libro Blanco sobre el caso de San Andrés y Providencia*), MN, vol. II, annexe 73.

31. La Partie demanderesse semble avoir le mal de mer lorsqu'elle s'aventure dans les eaux des Caraïbes pour établir quelles cayes relèvent de l'archipel de San Andrés et quelles cayes n'en relèvent pas. Dans sa requête introductive d'instance, le Nicaragua a déjà reconnu que les cayes d'Alburquerque, Est-Sud-Est et Bajo Nuevo doivent être considérées comme des «îles et cayes qui dépendent» des îles de Providencia, San Andrés et Santa Catalina. En effet, son premier *petitum* demande à la Cour «de dire et juger que la République du Nicaragua a la souveraineté sur les îles de Providencia, San Andrés et Santa Catalina *et sur toutes les îles et cayes qui en dépendent*, ainsi que sur les cayes de Roncador, Serrana, Serranilla et Quitasueño» *[traduction du Greffe]* (les italiques sont de nous)[101]. Ce n'est qu'ultérieurement au cours de la procédure que le Nicaragua a affirmé pour la première fois qu'Alburquerque, Est-Sud-Est et Bajo Nuevo ne faisaient pas partie de l'archipel[102]. Cette semaine le Nicaragua a abandonné sa revendication sur Alburquerque et Est-Sud-Est, si l'on croit l'interprétation graphique faite par son conseil lundi[103]. Certes, Monsieur le président, compte tenu du comportement nicaraguayen dans cette procédure, je ne peux pas me hasarder à vous dire si cette revendication réapparaîtra ou non la semaine prochaine.

32. Pour résumer ce point, Mesdames et Messieurs les juges, l'interprétation qui en découle du premier paragraphe de l'article premier est dénuée d'ambiguïté : le texte, son contexte, l'objet et le but du traité et le comportement des parties montrent que les cayes relevant de votre compétence sont comprises dans la formule «tous les autres îles, îlots et cayes qui font partie de l'archipel de San Andrés».

C. Le protocole de 1930 enterre définitivement toute prétention éventuelle nicaraguayenne sur les cayes encore sous examen

33. J'arrive maintenant à la clause stipulée par les parties dans le protocole de ratification de 1930 qui précise que l'archipel de San Andrés ne s'étend pas à l'ouest du 82e méridien. Ce texte a été ajouté à la demande du Nicaragua, qui voulait éviter que la Colombie revendique les cayes

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[101] Requête introductive d'instance, par. 8, premier *petitum.*

[102] MN, p. 265, conclusion 2).

[103] Nicaragua, dossier des juges, 23 avril 2012, onglets 26 à 29 [AP 1-4 à AP 1-7] ; CR 2012/8, p. 52-63, par. 16-40 (Pellet).

situées à proximité de la côte nicaraguayenne[104], les plus importantes d'entre elles étant les cayes Miskitos.

34. Deux points rapides, mais néanmoins importants, qui méritent d'être soulevés. *Primo,* la crainte du Nicaragua, qui justifie l'existence de cette clause, exclut d'emblée la théorie du demandeur, selon laquelle l'expression «tous les autres îles, îlots et cayes qui font partie de l'archipel» se réfère uniquement aux îlots situés à proximité immédiate autour des trois îles principales. *Secundo,* cette crainte évince aussi la thèse qui soutient que les cayes en question seraient éloignées des îles principales et que, par conséquent, elles ne pourraient pas entrer dans l'expression «archipel de San Andrés».

35. La ligne du 82e méridien constitue au moins une ligne d'attribution territoriale[105]. Un méridien divise la surface terrestre du nord au sud. Le 82e méridien sépare ce qui est colombien à l'est de ce qui est nicaraguayen à l'ouest, jusqu'à ce que l'on trouve des Etats tiers au nord et au sud. C'est aussi simple que cela. Il n'y avait tout simplement aucune revendication nicaraguayenne à l'est du 82e méridien.

36. Lundi, le conseil du Nicaragua a prétendu que le but du 82e méridien était de distinguer les îles Mangles (Corn Islands) de l'archipel de San Andrés[106]. Voilà un bel exemple d'un mépris pour la règle de l'effet utile dans l'interprétation des traités[107]. Il prive ainsi l'ajout du protocole de 1930 de tout effet car l'article premier du traité reconnaissait déjà explicitement que les îles Mangles étaient nicaraguayennes.

[104] MN, p. 7, par. 16 ; p. 176, par. 2.251 ; MN, vol. II, annexe 80 ; CMC, vol. II-A, annexe 199.

[105] CR 2012/8, p. 59, par. 29 (Pellet).

[106] *Ibid.*, p. 60, par. 30 (Pellet).

[107] *Affaire franco-hellénique des phares, arrêt, 1934, C.P.J.I. série A/B n° 62*, p. 27 ; affaire du *Détroit de Corfou (Royaume-Uni c. Albanie), fond, arrêt, C.I.J. Recueil 1949*, p. 24 ; *Interprétation des traités de paix conclus avec la Bulgarie, la Hongrie et la Roumanie, deuxième phase, avis consultatif, C.I.J. Recueil 1950,* p. 228-229 ; affaire de l'*Anglo-Iranian Oil Co. (Royaume-Uni c. Iran), exception préliminaire, arrêt, C.I.J. Recueil 1952*, p. 105 ; *Conséquences juridiques pour les Etats de la présence continue de l'Afrique du Sud en Namibie (Sud-Ouest africain) nonobstant la résolution 276 (1970) du Conseil de sécurité, avis consultatif, C.I.J. Recueil 1971*, p. 35, par. 66 ; *Plateau continental de la mer Egée (Grèce c. Turquie), arrêt, C.I.J. Recueil 1978*, p. 22, par. 52 ; *Différend territorial (Jamahiriya arabe libyenne/Tchad), arrêt, C.I.J. Recueil 1994*, p. 25, par. 51 ; *Délimitation maritime et questions territoriales entre Qatar et Bahreïn (Qatar c. Bahreïn), compétence et recevabilité, arrêt, C.I.J. Recueil 1995*, p. 19, par. 35 ; affaire relative à l'*Application de la convention internationale sur l'élimination de toutes les formes de discrimination raciale (Géorgie c. Fédération de Russie), exceptions préliminaires, arrêt, C.I.J. Recueil 2011*, p. 51-52, par. 133.

37. On sait que la crainte nicaraguayenne concernait précisément les autres cayes près de ses côtes, particulièrement les cayes Miskitos[108]. Regardons le croquis. Vous voyez que les cayes Miskitos se trouvent à l'ouest du 82e méridien. Ils se situent pratiquement à la même latitude que Quitasueño et Serrana. Si le Nicaragua avait des revendications sur ces cayes et sur les autres situées à l'est du 82e méridien, il aurait dû solliciter le tracé d'une autre ligne, même à segments multiples, ou d'un périmètre autour des trois îles principales. Par exemple, comme le relève la sentence arbitrale *Guinée/Guinée Bissau*[109], la France et le Portugal ont tracé un périmètre autour des îles portugaises dans leur convention de 1885, laissant toutes les autres formations insulaires sous souveraineté française.

38. Les travaux préparatoires confirment sans l'ombre d'un doute cette interprétation. Lorsque le Nicaragua demanda l'inclusion de la clause concernant le 82e méridien, il utilisa la carte nautique publiée par le bureau hydrographique des Etats-Unis d'Amérique de 1885[110]. Cette carte identifie le 82e méridien, tout comme d'ailleurs les cayes que le Nicaragua revendique aujourd'hui. Si le demandeur se considérait souverain sur ces cayes, sur lesquelles la Colombie exerçait sa souveraineté, pourquoi n'a-t-il rien dit, ni rien proposé ? A nouveau, la réponse est simple. Le Nicaragua a demandé le traçage d'une ligne verticale pour protéger les cayes sur lesquelles il avait véritablement une revendication et qui pouvaient entrer dans le champ de la définition de l'archipel de San Andrés. Il n'était point question des sept cayes dont nous discutons aujourd'hui.

39. Mesdames et Messieurs les juges, tous les éléments convergent vers cette interprétation. Le ministre nicaraguayen des affaires étrangères expliqua devant le Sénat que la ligne du 82e méridien «indiquait la limite géographique entre les archipels litigieux» *[traduction du Greffe]*[111]. Le conseil nicaraguayen a fait grand cas du terme espagnol «límite», qui selon lui serait erronément traduit par «boundary» dans les pièces colombiennes[112]. Mais le ministre nicaraguayen mentionne avec approbation que son collègue colombien interprétait la référence au méridien

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[108] Voir ci-dessus p. 13-14, par. 19-21.

[109] *Affaire de la délimitation de la frontière maritime entre la Guinée et la Guinée-Bissau*, sentence arbitrale du 14 février 1985, Nations Unies, *RSA.*, vol. XIX, p. 167, par. 45 et p. 169, par. 47.

[110] MN, p. 7, par. 16 ; CMC, p. 265, par. 5.50, et vol. III, figure 5.1.

[111] Compte rendu de la XLIXe session du Sénat du Congrès nicaraguayen tenue le 5 mars 1930, MN, vol. II, annexe 80, p. 259 ; CMC, vol. II-A, annexe 199, p. 736.

[112] CR 2012/8, p. 59, par. 29 (Pellet).

comme «permettant de démarquer la ligne de séparation» *[traduction du Greffe]*[113]. Frontière ? Limite ? Une frontière délimite l'étendue des compétences étatiques d'une part et d'autre, ou pour utiliser les mots de la sentence arbitrale *Guinée-Bissau/Sénégal*, «une frontière internationale est la ligne formée par la succession des points extrêmes du domaine de validité spatial des normes de l'ordre juridique d'un Etat»[114]. Monsieur le président, je pourrai établir une longue liste de traités latino-américains établissant des frontières intitulés «Tratados de Límites». Au hasard, j'en a choisi un : le «Tratado de Límites» du 15 avril 1858, définissant la frontière entre le Nicaragua et le Costa Rica[115]. Ou me référer encore à la *Comisión Mixta de Límites* honduro-nicaraguayenne établie par le traité Gamez-Bonilla, dont la traduction en anglais par votre Cour donne «Mixed Boundary Commission» (*Sentence arbitrale rendue par le roi d'Espagne le 23 décembre 1906 (Honduras c. Nicaragua), arrêt, C.I.J. Recueil 1960*, p. 199). Peu importe le terme : la détermination de la ligne frontière ou limite au 82e méridien supprime la possibilité pour le Nicaragua d'avoir quelque prétention que ce soit à l'est dudit méridien.

40. Mesdames et Messieurs les juges, peut-on sérieusement imaginer que la souveraineté nicaraguayenne saute par-dessus le 82e méridien et encore par-dessus des îles colombiennes pour s'établir vers l'est, le nord-est ou le sud-est ? Définitivement non.

41. Le ministre nicaraguayen des affaires étrangères à l'époque du protocole de 1930 avait raison lorsqu'il indiquait — je le cite à nouveau — que

> «[c]ette mise au point [celle du protocole de ratification] était nécessaire pour l'avenir des deux nations, puisqu'elle avait établi la limite géographique entre les archipels faisant l'objet du différend, sans laquelle la question n'aurait pas été complètement définie» *[traduction du Greffe]*[116].

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[113] Compte rendu de la XLIXe session du Sénat du Congrès nicaraguayen tenue le 5 mars 1930, MN, vol. II, annexe 80, p. 259 ; CMC, vol. II-A, annexe 199, p. 736.

[114] *Délimitation de la frontière maritime entre la Guinée-Bissau et le Sénégal, sentence arbitrale du 29 juillet 1989,* Nations Unies, *RSA*, vol. XX, p. 144, par. 63.

[115] *Différend relatif à des droits de navigation et des droits connexes (Costa Rica c. Nicaragua), arrêt, C.I.J. Recueil 2009*, p. 229, par. 19.

[116] Compte rendu de la XLIXe session du Sénat du Congrès nicaraguayen tenue le 5 mars 1930, MN, vol. II, annexe 80, p. 259 ; CMC, vol. II-A, annexe 199, p. 736. Texte anglais : «this clarification [of the Protocol of Ratification] was a need for the future of both nations, as it came to establish the geographical boundary between the archipelagos in dispute, without which the question would not be completely defined».

D. La situation de Quitasueño, Roncador et Serrana selon le traité de 1928-1930

42. Le texte du deuxième paragraphe de l'article premier du traité se réfère explicitement à trois cayes : Roncador, Quitasueño et Serrana. Les traductions anglaise et française fournies par la Société des Nations ne sont pas correctes. Le texte original espagnol se lit comme suit : «No se consideran incluidos en este Tratado los cayos Roncador, Quitasueño y Serrana, el dominio de los cuales está en litigio entre Colombia y los Estados Unidos de América». La publication de la SdN que la Cour a employé à titre d'information en 2007, traduit «*No se consideran incluidos* en este Tratado los cayos Roncador, Quitasueño et Serrana» comme signifiant «Le présent traité ne s'applique pas aux récifs Roncador, Quitasueño et Serrana.» La traduction exacte correspond davantage à «Ne sont pas considérées comme incluses dans le présent traité les cayes Roncador, Quitasueño et Serrana.»[117] L'arrêt du 13 décembre 2007 avait déjà fait remarquer l'insuffisance de la traduction de la SdN relativement au terme «cayos»[118]. Au stade du fond, la Colombie prie respectueusement la Cour de faire de même en ce qui concerne la traduction de l'expression «No se consideran incluidos en este Tratado».

43. Une interprétation littérale du texte dans son contexte révèle trois choses : *primo,* que les trois cayes font partie de l'archipel ; *secundo,* que le Nicaragua ne les revendique pas et qu'il ne pouvait pas reconnaître la souveraineté colombienne sur ces dernières comme il l'avait fait sur le reste de l'archipel, car *tertio,* il existait à l'époque un différend les concernant entre la Colombie et les Etats-Unis d'Amérique.

44. Le Nicaragua affirme, à tort, que le texte du traité de 1928 ne permet pas d'inclure ces trois cayes dans l'archipel[119]. Il s'agit en réalité du contraire : si les parties ont inséré cette disposition, c'est parce que les trois cayes font partie de l'archipel. Ce sont les Etats-Unis qui ont, à l'origine, exigé l'introduction de ce paragraphe, car ils voulaient éviter que le Nicaragua ne reconnaisse la souveraineté colombienne sur des cayes, qu'ils revendiquaient eux-mêmes. Il nous faut rappeler que ce différend américano-colombien a débuté en 1853 et fut réactivé, lorsque des

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[117] CMC, p. 252, par. 5.22, note 25.

[118] *Différend territorial et maritime (Nicaragua c. Colombie), exceptions préliminaires, arrêt, C.I.J. Recueil 2007 (II)*, p. 842, par. 18.

[119] CR 2012/8, p. 36, par. 16-18 (Remiro) ; p. 52, par. 13 (Pellet).

ressortissants états-uniens ont voulu extraire du *guano* sans autorisation colombienne[120]. Le Nicaragua n'avait pas réagi durant toutes ces occasions.

45. Comme on le sait, aussitôt la conclusion du traité Esguerra-Bárcenas entre la Colombie et le Nicaragua en 1928, les Etats-Unis et la Colombie ont conclu l'accord Olaya-Kellogg, afin de régir la situation des trois cayes. La Colombie notifia la conclusion de cet accord au Gouvernement nicaraguayen en ces termes :

> «J'estime devoir informer Votre Excellence que les cayes de Roncador, Quitasueño et Serrana ayant été exclues du traité du 24 mars en raison du fait qu'elles font l'objet d'un litige entre la Colombie et les Etats-Unis, le gouvernement de ces derniers, reconnaissant la Colombie comme étant le propriétaire et le souverain de *l'archipel dont lesdites cayes font partie*, a conclu avec le Gouvernement de la Colombie, en avril dernier, un accord ayant mis fin au différend, en vertu duquel le *statu quo* en la matière était conservé.» *[Traduction du Greffe.]* (Les italiques sont de nous.)[121]

46. Le Nicaragua n'a jamais contesté les termes de l'accord Olaya-Kellogg. Il n'a pas objecté non plus à l'affirmation selon laquelle Roncador, Quitasueño et Serrana faisaient partie de l'archipel et que la Colombie détenait la souveraineté sur celui-ci. Ceci constitue un comportement totalement incompatible avec une quelconque revendication de souveraineté.

47. Il est intéressant de relever les contradictions internes des arguments du Nicaragua. Je poserai trois questions. La première : pourquoi avait-on besoin d'inclure dans le traité une référence à Roncador, Quitasueño et Serrana, si ces trois cayes ne feraient pas partie de l'archipel de San Andrés ? La deuxième : si le Nicaragua estimait que ces trois cayes relevaient de sa souveraineté, pourquoi ne pas l'avoir manifesté dans ce traité, qui mentionne que le différend existant à leur égard oppose la Colombie aux Etats-Unis ? Finalement : si, selon les dires du Nicaragua, les Parties citent des cayes qui ne feraient pas partie de l'archipel, pourquoi alors n'aurait-on pas explicitement mentionné Alburquerque, Est-Sud-Est, Serranilla et Bajo Nuevo, qui, selon le Nicaragua, relèveraient de leur souveraineté et qui seraient donc exclues de l'archipel ?

48. Je mentionne encore un élément supplémentaire. La première revendication émise par le Nicaragua sur Quitasueño, Roncador et Serrana en 1972 n'était pas fondée sur le fait que ces trois cayes n'appartenaient pas à l'archipel, ni même sur l'*uti possidetis juris*, mais sur leur prétendue

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[120] CMC, p. 150-164, par. 4.3-4.31.

[121] *Ibid.*, p. 255-256, par. 5.31, vol. II-A, annexe 49.

présence «sur le plateau continental» et «sur la mer patrimoniale du Nicaragua», pour citer les mots de l'Assemblée constituante nicaraguayenne du 4 octobre 1972[122].

49. Monsieur le président, Mesdames et Messieurs les juges, en vertu du deuxième paragraphe de l'article premier du traité de 1928, le Nicaragua est forclos de formuler une quelconque revendication de souveraineté sur les cayes de Roncador, Quitasueño et Serrana[123]. Le demandeur est allé en effet bien au-delà du simple silence : difficile de trouver un autre exemple d'un Etat qui, après avoir conclu un traité qui reconnaît expressément qu'un territoire donné fait l'objet d'un différend entre deux autres Etats, vient quelques décennies plus tard revendiquer la souveraineté sur ce même territoire !

50. Le différend américano-colombien fut définitivement réglé par la renonciation états-unienne à sa revendication, en vertu de traité Vasquez-Saccio de 1972, doublée d'un exercice continu de la souveraineté colombienne sur les trois cayes[124].

51. Pour résumer la situation, Mesdames et Messieurs les juges : s'il y avait eu un différend entre le Nicaragua et la Colombie au sujet de la souveraineté sur Roncador, Quitasueño et Serrana, ce différend eût existé parce que le Nicaragua revendiquait l'ensemble de l'archipel. Il prit donc fin lors de l'entrée en vigueur du traité de 1928-1930. Pour quelles raisons ? Parce que le traité exclut ces trois cayes uniquement de la portée de la reconnaissance nicaraguayenne relative à la souveraineté colombienne de l'archipel de San Andrés, afin que le Nicaragua ne prenne pas position sur le différend qui opposait la Colombie aux Etats-Unis ; parce que, par le protocole de 1930, en traçant la ligne du 82e méridien comme étant la «limite des archipels», le Nicaragua a admis que ces trois cayes ne sont pas nicaraguayennes ; parce que l'ensemble conventionnel de 1928-1930 avait pour but de mettre un terme à tout différend territorial entre la Colombie et le Nicaragua ; parce que le seul autre Etat qui revendiquait la souveraineté sur les trois cayes a renoncé à sa revendication en vertu du traité de 1972 ; parce que la Colombie a continué d'accomplir des actes à titre de souverain sur les trois cayes après l'entrée en vigueur du traité de 1928-1930, ceci en l'absence de toute revendication nicaraguayenne jusqu'en 1972 ; finalement,

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[122] MN, p. 133, par. 2.158, et p. 136, par. 2.166.

[123] *Temple de Préah Vihéar (Cambodge c. Thaïlande), fond, arrêt, C.I.J. Recueil 1962,* p. 40.

[124] CMC, p. 174-188, par. 4.51-4.77.

parce que cette revendication nicaraguayenne si tardive se fonde uniquement sur la présence présumée des trois cayes sur un prétendu plateau continental, argument juridiquement intenable, voire même impossible : en effet, le concept juridique de plateau continental n'existait pas en 1928.

Conclusions

52. Monsieur le président, Mesdames et Messieurs les juges, en arrivant à mes conclusions, je peux résumer ainsi la situation, en ce qui concerne la souveraineté territoriale. Une partie peut invoquer un titre existant au moment de son indépendance, ainsi qu'un traité territorial qui le confirme de manière catégorique. Une partie peut invoquer des effectivités coloniales et postcoloniales. Une partie peut invoquer une large reconnaissance internationale de son titre de souveraineté, y compris la reconnaissance formulée par l'Etat qui vient devant vous pour revendiquer sa souveraineté. Une partie peut avancer une preuve cartographique dépourvue d'ambiguïté. Et qu'oppose-t-on de l'autre côté de la barre ? Une revendication-caméléon tardive, qui change au gré des développements de l'affaire, et qui finit par se fonder sur une présumée proximité géographique à une côte éloignée et enfin sur un argument prétendument géologique fantaisiste, qui place la charrue avant les bœufs, autrement dit le plateau continental avant le territoire. A cela s'ajoute le silence du Nicaragua, durant des décennies après la conclusion du traité de 1928-1930, face à l'exercice publique et pacifique de la souveraineté colombienne sur les cayes qu'il revendique aujourd'hui. Pour reprendre les mots de la Cour, un silence qui est éloquent, puisque le comportement de l'autre Etat appelait une réponse du Nicaragua, s'il s'estimait en être le souverain[125].

53. Monsieur le président, permettez-moi de relever le caractère profondément déstabilisateur de la démarche du Nicaragua. Il s'agit d'une revendication contraire aussi bien au principe de stabilité des règlements territoriaux[126] qu'un autre principe élémentaire, qui régit les relations internationales, et dont l'infraction flagrante ne devrait obtenir comme réaction qu'une réponse ferme et catégorique : le principe *pacta sunt servanda*.

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[125] *Souveraineté sur Pedra Branca/Pulau Batu Puteh, Middle Rocks et South Ledge (Malaisie/Singapour), arrêt, C.I.J. Recueil 2008,* p. 51, par. 121.

[126] *Différend territorial (Jamahiriya arabe libyenne/Tchad), arrêt, C.I.J. Recueil 1994,* p. 37, par. 72-73 ; *Différend territorial et maritime (Nicaragua c. Colombie), exceptions préliminaires, arrêt, C.I.J. Recueil 2007 (II),* p. 861, par. 89.

54. Mesdames et Messieurs les juges, je vous remercie de votre attention et vous prie, Monsieur le président, de bien vouloir donner la parole à Me Rodman Bundy.

Le PRESIDENT : Merci, Monsieur le conseil. I give the floor to Mr. Bundy. You have the floor, Sir.

Mr. BUNDY: Thank you very much, Mr. President.

4. THE CONFIRMATION OF COLOMBIA'S TITLE BY ITS EXERCISE OF ADMINISTRATION AND CONTROL OVER THE ISLANDS

1. Introduction and legal framework

1. Mr. President, Members of the Court, it is as always an honour to appear before you, and it is also a great honour for me to represent the Government of Colombia in this case which is really of critical importance to it.

2. My colleague, Professor Kohen, has explained that Colombia possesses title to the islands in issue by virtue of the principle of *uti possidetis juris*, and that the issue of sovereignty over the San Andrés Archipelago was settled definitively by the 1928 Treaty and 1930 Protocol. My task is to discuss the acts of administration and control — the *effectivités* — that Colombia has performed *à titre de souverain* with respect to those islands in confirmation of Colombia's title both before and after the 1928 Treaty.

3. Colombia's principal submission is that the *effectivités* do indeed confirm Colombia's prior title to the islands; in other words, the activities that Colombia has carried out in relation to the islands coincide with Colombia's pre-existing title and are entirely consistent with the legal position that resulted from the 1928-1930 agreement. As is well known, Chambers put it in its Judgment in the *Frontier* case: "Where the act corresponds exactly to law, where effective administration is additional to the *uti possidetis juris*, the only role of *effectivité* is to confirm the

exercise of the right derived from a legal title." (*Frontier Dispute (Burkina Faso/Republic of Mali), Judgment, I.C.J. Reports 1986*, pp. 586-587, para. 63.)[127]

4. However, even in cases where the *effectivités* do not co-exist with a prior title, the Court has still made it clear, most recently in its 2007 Judgment in the *Nicaragua-Honduras* case, that: "A sovereign title may be inferred from the effective exercise of powers appertaining to the authority of the State over a given territory." (*Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua* v. *Honduras), Judgment, I.C.J. Reports 2007 (II)*, p. 712, para. 172.) Now I realize that Professor Remiro Brotóns cited that passage on Monday (CR 2012/8, p. 45, para. 60), but he did not mention that, in the same paragraph of the Court's Judgment, the Court went on to draw attention to the basic conditions that need to be satisfied in order to sustain a claim of sovereignty — conditions that apply equally in our case, and that was articulated as far back as the *Eastern Greenland* case — namely:

> "a claim to sovereignty based not upon some particular act or title such as a treaty of cession but merely upon continued display of authority, involves two elements each of which must be shown to exist: the intention and will to act as sovereign, and some actual . . . display of such authority" (*I.C.J. Reports 2007 (II)*, p. 712, para. 172, citing *Legal Status of Eastern Greenland, Judgment, 1933*, *P.C.I.J. Series A/B, No. 53*, pp. 45-46).

2. Colombia has exercised effective administration and control over the islands; Nicaragua has done nothing

5. Now, in considering the question which Party has shown both the intention to act as sovereign over the islands and some actual display of such authority on the ground, there are four key factors which place the whole question of *effectivités* in their proper perspective.

6. *First*, Colombia has adduced documentary evidence of its effective administration and control over *all* of the islands that Nicaragua now claims. Those *effectivités*, some of which I will discuss in the time that remains this afternoon, show that the islands of the San Andrés Archipelago were indeed administered as a unit, contrary to what we heard on Monday. Moreover, even though this Court has held that, in the case of small islands, only a modest display of State powers needs to

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[127]See also: *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening), Judgment, I.C.J. Reports 1992*, p. 398, para. 61; *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria: Equatorial Guinea intervening), Judgment I.C.J. Reports 2002*, p. 353, para. 68, p. 354, para. 70 and p. 415, para. 223; *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia), Judgment, I.C.J. Reports 2002*, p. 678, para. 126; *Frontier Dispute (Benin/Niger), Judgment, I.C.J. Reports 2005*, pp. 120-121, para. 47 and p. 127, para. 77).

be shown[128], in the present case the evidence adduced by Colombia is overwhelming. The materials furnished with Colombia's written pleadings attest to a wide range of activities that Colombia has undertaken with respect to the islands that is extensive in terms of its quantity (there are literally hundreds of pages of documentary evidence in the record); its geographical scope (it covers all of the islands in issue in this case); and its long-standing nature (Colombia's *effectivités* date back over 150 years).

7. Now the actions that I shall focus on were of an official nature undertaken *à titre de souverain* by the authorities in charge of administrating the archipelago, not by private entrepreneurs, as Professor Remiro Brotóns tried to suggest (CR 2012/8, p. 45, paras. 63-64). They range from issuing legislation covering each of the islands, to the regulation of guano extraction and fishing around them, the application and enforcement of Colombia's civil and criminal law, the undertaking of public works, search and rescue missions, the issuance of environmental regulations, and official mapping and charting exercises covering the islands and their surrounding cays and banks. All of the islands and cays have at one time or another been the subject of Colombian administrative acts, both collectively and individually.

8. The second point I would make is that Nicaragua cannot point to any evidence that it ever had either the intention to act as sovereign over these islands, let alone that it engaged in a single act of a sovereign nature on them. The plain fact is that Nicaragua has never set foot on these islands in any capacity — let alone a sovereign capacity — either before or after the 1928/1930 agreements.

9. Given this situation, it is no accident that Nicaragua's written pleadings ignored the whole question of *effectivités* and produced not a single piece of evidence of any Nicaraguan *effectivités*.

10. On Monday, Professor Remiro Brotóns tried to regroup. He argued that the *effectivités* were irrelevant because they cannot displace a prior title (CR 2012/8, p. 44, para. 59 and p. 48, para. 79). But the problem, as Professor Kohen has just showed, is there is not a trace — not a trace — not a scintilla of evidence of any prior Nicaraguan title, none.

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[128] *Nicaragua* v. *Honduras, Judgment, I.C.J. Reports 2007 (II)*, p. 712, paras. 173-174. And see also, *Legal Status of Eastern Greenland, Judgment, 1933, P.C.I.J. Series A/B, No. 53*, pp. 45-46 and *Sovereignty over Pulau Ligitan and Pulau Sipidan (Indonesia/Malaysia), Judgment, I.C.J. Reports 2002*, p. 682, para. 134.

11. Counsel for Nicaragua was obviously a bit uneasy with his argument because he went on to argue, with help from my good friend, Professor Pellet, that Colombia's *effectivités* were limited and late (CR 2012/8, p. 44, para. 59), not carried out before the critical date — which Professor Remiro Brotóns put at 1969 (CR 2012/8, p. 47, para. 72) but then Dr. Oude Elferink suggested a later date of 2001 (CR 2012/9, p. 59, para. 54), that they were undertaken by private individuals (CR 2012/8, p. 45, paras. 63-64), they were general in nature because they did not refer to islands specifically and the administrative acts never specified the islands to which they related (CR 2012/8, pp. 46-47, para. 70), and they were protested by Nicaragua (CR 2012/8, p. 47, para. 74; and see Professor Pellet, CR 2012/8, p. 53, para. 18). That is what you heard on Monday.

12. I shall show that each one of these contentions is dead wrong when the factual record is consulted.

13. The *third* factor that characterizes the Parties' conduct concerns precisely Nicaragua's lack of protests over Colombia's exercise of sovereignty over the islands. Throughout the long period — going back 150 years — that Colombia has been carrying out sovereign functions around each and every one of the islands prior to Nicaragua's 1969 critical date, Nicaragua remained silent. As the Court observed in the *Malaysia/Singapore* case: "Such manifestations of the display of sovereignty may call for a response if they are not to be opposable to the State in question. The absence of reaction may well amount to acquiescence." (*Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore), Judgment, I.C.J. Reports 2008*, p. 50, para. 121.) That is what has happened here. Our opponents assert there were protests. Where? When?

14. *Fourth*, Colombia's sovereignty over the islands of the archipelago is not challenged by any third State. By virtue of the delimitation agreements that they have entered into with Colombia, all the other States in the region such as Panama, Costa Rica, Jamaica and Honduras have proceeded on the basis that the islands are Colombian. And as for the international community as a whole, there is not a shred of evidence that any State considers that Colombia's sovereignty over the islands is in question, even less that Nicaragua has any rights over them.

15. In short, Mr. President and Members of the Court, we are in a position here where the facts all point in one direction. Colombia has acted in a sovereign capacity with respect to the islands for well over a century and a half. Nicaragua has done nothing.

3. Examples of Colombia's *effectivités*

16. Now, as I said, contrary to what we heard on Monday, Colombia's administration of the islands does in fact have a long history. Obviously time, particularly late in the afternoon, does not permit me to review all of the literally hundreds of official acts that Colombia has carried out and which it continues to carry out to the present. What I hope will be more helpful to the Court is if I highlight a number of representative examples of State conduct grouped under different types of administration to show the nature and scope of Colombia's exercise of sovereign authority.

A. The political organization of the San Andrés Archipelago

17. Let me start with the political organization of the San Andrés Archipelago as part of the territory of Colombia.

18. Since 1803, Colombia has always had a senior administrative official as the head of the local government stationed in the archipelago. Those officials were appointed by the Viceroyalty of New Granada, and by Colombia itself after independence. A list of all of them — I think there are 113 in total — may be found in Appendix 3 to Colombia's Counter-Memorial, together with the dates of their administration.

19. In 1824, Colombia enacted a law regarding the political divisions of its territory which provided that the islands of San Andrés comprised one of the country's cantons with its seat in San Andrés Island[129].

20. The fact that Colombia's sovereignty extended to all of the islands of the archipelago was recognized by other powers during the nineteenth century. For example, there is a Note from the British Colonial Office sent to the Governor of Jamaica as far back as 1874, which indicated very clearly that the territory of San Andrés and Providencia comprised not only the islands of those names, but also Serrana, the Serranilla Cays, the Alburquerque Cays, Roncador and

[129]CMC, Vol. II-B, App. 4, p. 35.

Courtown, which is the East-Southeast Cays[130]. The Note indicated very clearly that it appeared that the islands were under the sovereignty of Colombia pursuant to the 1803 Royal Decree, that Professor Kohen discussed.

21. In 1912, a law was enacted (Colombian Law No. 52 of 1912) creating the National Intendency of San Andrés and Providencia[131] and that law contained tax provisions relating to the islands; it provided for a vessel of the National Government to carry out communications between the archipelago and the mainland, and authorized the Government to build lighthouses on the islands.

22. A further Presidential Decree was enacted in the same year — 1912 — authorizing the local official, the Intendente to grant licences for pearl fishing, and for the exploitation of coral, turtle, tortoiseshell, guano and sponge along the coasts of the territory of the Intendency[132]. In 1920, the Intendente reported to the Government on developments specifically concerning Roncador, Serrana and Quitasueño -- they were named. That report confirmed that the Government official was also exercising acts of dominion over all of the islands of the archipelago and that policing activities were being put in place to prevent foreigners from fishing around the islands without the permission of the Colombian Government[133].

23. Colombia has enacted numerous laws dealing with the administration of the islands, and you will find a list of all such laws, from the period from 1824 to the present, in Appendix 4 to Colombia's Counter-Memorial. These laws dealt with every imaginable scope of activity, from financial and tax matters, agriculture, fishing, scientific research, public works, health, customs, and environmental protection; I might add on the environmental protection point, specific legislation was enacted in 1968, that is before Professor Remiro Brotóns' critical date, designating, by name, Serrana, Roncador, Quitasueño, Serranilla and Bajo Nuevo, as environmental preservation zones[134]. Need I recall that in the *Indonesia/Malaysia* case concerning Sipadan and Ligitan, the Court found that the establishment of a nature reserve "must be seen as regulatory and

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[130]CMC, Ann. 173.

[131]*Ibid.*, Ann. 91.

[132]*Ibid.*, Ann. 93.

[133]*Ibid.*, Ann. 103.

[134]*Ibid.*, Anns. 133 and 134.

administrative assertions of authority over territory which is specified by name" (*Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia), Judgment, I.C.J. Reports 2002*, p. 684, para. 145); this territory was specified by name.

B. Licensing of activities on the islands

24. Starting in the nineteenth century, Colombia also began to issue licences for the exploitation of the resources found on the islands. While some of these licences were indeed granted to private persons, they took place on the basis of permits and contracts issued by the Government. And it is that conduct which represents conduct carried out *à titre de souverain*, not the actions of private entrepreneurs.

25. As far back as 1854, the Governor of Cartagena issued a decree banning the extraction of guano from islands that form the San Andrés Archipelago which, under that decree, were considered to be part of Colombia's national territory[135].

26. That was followed, in 1871, by the issuance of a Colombian law granting the Colombian Executive Branch the sole right to lease the right to extract guano and collect coconuts from the islands of Alburquerque, Roncador and Quitasueño, which were again, expressly named -- this was not general legislation -- they were expressly indicated, as forming part of the territory of San Andrés and Providencia[136]. In the same year, the Colombian Prefect who was administering the archipelago voiced concerns about foreigners engaged in illegal turtle fishing and guano extraction in, and on Roncador and Quitasueño, which the Prefect of San Andrés identified as being part of the territory under his administration[137]. As a result, a Colombian decree was enacted thereafter forbidding such activities on these islands, together with Alburquerque, without proper permits, as well as on the remaining cays connected to the islands of San Andrés and Providencia[138]. So again, legislation specifically naming islands -- by a long past century and a half – pre-Nicaragua's critical date.

[Tab 33 in judges' folders]

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[135]CMC, Ann. 72.

[136]*Ibid*., Ann. 73.

[137]*Ibid*., Ann. 74.

[138]*Ibid*., Ann. 75.

27. From the nineteenth century onwards, Colombia has issued numerous permits for economic activities on the islands. To give a flavour of this practice, you can see it from the list on the screen. To satisfy counsel for Nicaragua, I have not included on this list permits that covered the archipelago generally — believe me, there are plenty of them — I have only put on this list permits issued by governmental authorities that refer to specific islands.

— 1871: Lease for coconuts on Alburquerque granted by the Prefect of San Andrés and Providencia (CMC, Ann. 77);

— 1893: guano permit issued for Serrana "located in the Province of Providencia, in the Archipelago of San Andrés"; so there is an indication that Serrana was indeed considered to be part of the San Andrés Archipelago (CMC, Ann. 86);

— 1896: guano and fertilizer contract for Roncador, Quitasueño, and South-East Cays "and others of the Archipelago of San Andrés . . ." — so they were clearly part of the archipelago — these were permits issued by the Ministry of Finance (CMC, Ann. 90);

— 1915: guano contract issued for Roncador, Quitasueño, Serranilla and South West Cay — which are Alburquerque — again "in the Archipelago of San Andrés and Providencia", also issued by the Ministry of Finance (CMC, Ann. 97);

— 1915: report to the Colombian Council of Ministers on the legal aspects of guano exploitation contracts on the islands again of the archipelago, called Roncador, Quitasueño, Serranilla and South-West Cay (CMC, Ann. 96);

— 1916-1926: further contracts for the exploitation of Guano were issued and permission was given to the licence holder of those contracts to erect structures and installations on Roncador, Serranilla, Quitasueño, and Alburquerque, located once more in the archipelago of San Andrés, and once again granted by Government authorities (CMC, Anns. 96, 99, 100 and 110);

— 1929: commission of a Government study on guano deposits situated on Roncador, Quitasueño, the Serrana Cays and Alburquerque, again in the archipelago of San Andrés (CMC, Ann. 115 and 125).

28. Mr. President, again I could go on, but I will not tire, particularly you, but also me. These are hardly post-critical examples of *effectivités*; they relate to specific islands not to the archipelago generally; they were issued by governmental authorities. They show that all the

islands were part of the San Andrés Archipelago, and they were never protested by Nicaragua. They also show that the islands were not mere "rocks" and that, even if they were, they were capable of sustaining economic life.

C. Enforcement of fishing regulations

29. Colombia has also been diligent in regulating fishing activities in the areas appurtenant to the islands and in enforcing those regulations.

30. As with the exploitation of the resources of the islands, those enforcement measures also date back to the nineteenth century, and have continued up to the present. As early as 1892, for example, the Colombian Ministry of Finance appropriated funds to enable a ship to be sent specifically to Roncador and to Quitasueño to stop illegal activities on these islands[139]. The Ministry's Directive made it clear that Colombia would take whatever measures that might be required to protect its sovereignty over those territories.

31. By the early twentieth century, Colombia's control of fishing was well known. In 1925, a decree was issued by the Intendente of San Andrés and Providencia to appropriate funds for the lease of a ship that captured two vessels operating under the British flag that were engaged in the illegal catch of tortoiseshell in Quitasueño[140].

32. It was during this same period that Colombia was faced with illegal fishing operations being carried out around the islands by fishermen from the Cayman Islands, who were under the jurisdiction of the British Colony of Jamaica. In response, the Cayman Islands' authorities issued Government Notices in 1914 and again in 1924 which reminded fishing vessels fishing for products in the waters of Colombia in the San Andrés Archipelago, and who were engaged in the removal of guano or phosphates from the islands and cays, that these were illegal without a licence issued by the Colombian Government[141]. What is interesting also, is that the 1924 Notice specifically listed the islands of the San Andrés Archipelago as including not only the islands of San Andrés and Providencia, but also Serrana, Serranilla, Roncador, Bajo Nuevo, Quitasueño — which was referred to as a "cay" — Alburquerque and Courtown — which are the East-Southeast Cays. That

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[139]CMC, Ann. 84.

[140]*Ibid.*, Ann. 108.

[141]*Ibid.*, Anns. 185, 186 and 194.

was a crystal clear indication that the archipelago was indeed viewed as a unit and it was administered by Colombia as such.

33. A number of the measures that Colombia has adopted with respect to fishing have been aimed at preventing the depletion of vulnerable or endangered species. For example, Colombia, in co-operation with the United States, has implemented a ban on conch fishing in the waters adjacent to Quitasueño, has established closed seasons for conch fishing around Roncador and Serrana, and has set limits to the catch of spiny lobsters also around Roncador and Serrana[142].

34. On several occasions, foreign-flagged vessels operating without licence in the waters of the islands have been subject to interdiction. I mentioned some early examples of this practice a few minutes ago when I referred to the funds that were appropriated for vessels to interdict shipping. Another more recent example, but still before Nicaragua's critical date, occurred in November 1968 when a US-flagged vessel fishing in Colombian waters around Quitasueño was sequestered in order to determine whether it had in fact complied with Colombian regulations[143]. In Appendix 8 to Colombia's Counter-Memorial, the Court will find details of 50 such incidents that took place in the waters of Serrana, Serranilla and Quitasueño, as well as more generally in the archipelago as a whole. In the 1980s, Colombia entered into two fishing agreements with Jamaica allowing Jamaican fishing vessels, but no others, to undertake fishing activities around Serranilla and Bajo Nuevo, provided that certain annual catch limits to preserve the resources were not exceeded[144]. Those agreements provided that up to 36 fishermen could stay on Serranilla and up to 24 fishermen from Jamaica could stay on Bajo Nuevo. That many individuals do not stay on "rocks".

D. Immigration control

35. Turning to diplomatic representation and immigration control, as early as 1913, the German Empire recognized that the jurisdiction of its Vice-Consul stationed in Cartagena extended

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[142]CMC, Anns. 11-13.

[143]*Ibid.*, Ann. 131.

[144]*Ibid.*, Anns. 7 and 9.

over the islands of San Andrés, Providencia and Roncador[145]. Roncador was specifically mentioned.

36. In connection with its control of fishing and its regulation of fishing, Colombia has also exercised immigration control over the other islands. Obviously, aside from the main islands of San Andrés, Providencia and Santa Catalina, the only islands where foreign fishermen have been allowed to stay are Serranilla and Bajo Nuevo, relating to the Jamaican fishermen I referred to a moment ago, but only on the condition that they are in possession, not only of fishing permits but of identification cards issued by the Colombian Consulate in Kingston, and that they are subject to Colombian laws, rules and regulations. The 1984 Agreement with Jamaica was also premised on the understanding, which is set out expressly in the agreement, that the two islands, Serranilla and Bajo Nuevo, allowed habitation and could sustain life of their own[146]. Jamaica was in a good position to know that since it was their citizens that were staying on the islands.

E. Naval visits to the islands and search and rescue missions

37. Colombia has also routinely sent naval patrols to each of the islands. The earliest recorded example of this dates back to 1937 when a Colombian warship made an expedition to Quitasueño, where the lighthouse was visited, and to Serrana, where a foreign vessel was reminded that it needed a Colombian permit, and to Roncador, where the landing party spent a day investigating the island[147]. All of this is documented in our pleadings. Again, this was an administrative act relating to specifically named islands.

38. A whole host of such visits have taken place since, as are set out in Appendix 7 to Colombia's Counter-Memorial. I will just put a few of them, again trying to focus on at least Professor Romiro Brotóns' critical date, if not Professor Oude Elferink's later critical date. We have:

[Tab 34 in judges' folders]

— 1949: A Colombian destroyer visiting Serrana

— 1967: Surveillance of Serrana, Roncador and Quitasueño — there are documents

[145]CMC, Anns. 94 and 119.

[146]*Ibid.*, Anns. 7 and 9.

[147]*Ibid.*, Ann. 120.

referring to these islands and these operations

— 1968: Naval visit to the same three islands (see also CMC, Ann. 130)

— 1969: Patrolling of Serrana, Roncador and Quitasueño

— 1969: Patrolling for illegal fishing and smuggling around Serrana, Roncador and Quitasueño

— 1969: A group of, I think, eight Colombian Senators went and actually visited the islands of Quitasueño, Serrana and Roncador.

39. In that connection the naval jurisdiction assigned to the Port Captaincies — there have been Port Captaincies established in the San Andrés Archipelago during the early twentieth century — and their jurisdiction comprises all the islands of the archipelago[148].

40. Colombia has documented several examples of Search and Rescue Missions undertaken by its Navy within the waters of the islands of the archipelago. Again, I have listed just a few of these that have taken place in the immediate vicinity, in the territorial waters of each of the islands: [Tab 35 in judges' folders]

— 1969: Rescue of a vessel off Alburquerque (CMC, Ann. 135)

— 1969: Towing of a vessel in distress to Quitasueño *(ibid.)*

— 1971: Rescue of grounded vessel at Serrana (CMC, Ann. 136)

— 1983: Rescue of vessel off Alburquerque (CMC, Ann. 145)

— 1986: Rescue of sailboat at Quitasueño (CMC, Ann. 146)

— 1989: Assistance to grounded vessel at Roncador (CMC, Ann. 154)

— 1990: Rescue of Nicaraguan vessel at Alburquerque (CMC, Ann. 152)

The list goes on and there are many in our written pleadings. Now there is obviously no similar conduct by Nicaragua.

F. Public works on the islands

41. I inform the Court that this is the beginning of the end, if it is of any help: a further category of relevant State conduct concerns the public works that Colombia has carried out on each

[148]CMC, Ann. 28.

of the islands. As early as 1894, Colombia was approached by the Kingdom of Sweden and Norway with a request to investigate the advisability of erecting a lighthouse on Roncador — a clear recognition of Colombia's sovereignty over that island[149]. And in 1919, the United States' Minister in Bogota addressed a request to the Colombian Foreign Minister to obtain Colombia's permission to build two lighthouses — one of them on Providencia and the other on East-Southeast Cays[150].

42. Since the 1940s, Colombia has been involved in building, operating or maintaining lighthouses on the islands. Lighthouses or other navigational aids currently exist on Alburquerque, the East-Southeast Cays, Quitasueño, Roncador, Serrana, Serranilla, and Bajo Nuevo. As the Court stated in its Judgment in the *Qatar-Bahrain* case: "The construction of navigational aids . . . can be legally relevant in the case of very small islands." (*Maritime Delimitation and Territorial Questions between Qatar and Bahrain, (Qatar* v. *Bahrain), Merits, Judgment, I.C.J. Reports 2001*, p. 100, para. 197.) Here, Colombia is responsible for navigational aids on all of the islands at issue in these proceedings. Moreover, Colombia has documented periodic visits by the Navy precisely to modernize and maintain the lights on East-Southeast Cays in 1964[151], and Quitasueño, Serrana, again the East-Southeast Cays and on Roncador in 1968[152]. The Navy installed solar signalling systems on the East-Southeast Cays, and all of the other islands in 1980[153], and rebuilt various lights from 1996-2006[154]. That more recent conduct, lest I be accused of straying into post-critical-date territory, is no more than the normal continuation of exactly the same kinds of activities that Colombia was carrying out earlier.

G. Preparation of maps and charts of the islands

43. In Volume III to Colombia's Counter-Memorial, the Court will also find a number of official maps produced since 1920 — produced by Colombia — which include the archipelago with all of its islands, islets and cays as part of Colombian territory. We saw a couple of those

[149]CMC, Ann. 28.

[150]*Ibid*., Ann. 40.

[151]*Ibid*., Ann. 129.

[152]*Ibid*., Ann. 132.

[153]*Ibid*., Ann. 132.

[154]*Ibid*., Ann. 143.

maps on the screen earlier this afternoon. And Colombia has issued charts of the individual islands. The important point is that, in so doing, Colombia was acting in a sovereign capacity in mapping and charting its territory. Appendix 9 to the Colombian Counter-Memorial contains the vast list of maps published by the Colombian Geographic Institute between 1951 and 2006. In Appendix 2 the Court will find a list of numerous Colombian publications dating back over 100 years, mentioning the archipelago and all the islands as part of Colombia and, once again, Nicaragua has done nothing similar.

4. Conclusions

44. Mr. President, it would be possible for me to continue in this vein more or less indefinitely. But I scarcely think it is necessary. There is a wealth of material in Colombia's written pleadings that the Court has at its disposal that does demonstrate, not only Colombia's intention to act as sovereign over each of the islands, but also the actual display of State authority on the ground and within the islands' maritime areas. That conduct was carried out *à titre de souverain*, it was island specific, it was extensive and long-standing, it showed that all of the islands were part of the San Andrés Archipelago as a unit and it was not protested by Nicaragua. In short, Mr. President, Members of the Court, the documentary record thoroughly rebuts Professor Pellet's extraordinary assertion on Tuesday, I think it was. He said that this practice is "in general non-existent", «en général inexistante» (CR 2012/8, p. 53, para. 18). That proposition cannot be sustained in the light of the evidence.

45. If you were to place each Party's *effectivités* on a scale, the scale would break. For there is simply nothing on the Nicaraguan side of the equation that can even begin to compare with Colombia's conduct. That conduct not only confirms Colombia's case on sovereignty; it provides an independent basis of sovereign title in the event, remote as we feel it is, that such a basis is needed on top of the pre-existing Colombian title that has been shown to exist.

Mr. President, Members of the Court, I thank you very much for your attention and I think this is probably an appropriate place, if it is convenient for you, Mr. President, to bring Colombia's presentation today to a close.

The PRESIDENT: Thank you very much, Mr. Bundy. This indeed brings to an end today's pleading of Colombia, which tomorrow will have six additional hours in the morning and the afternoon, to complete its presentation. The Court will meet tomorrow at 10 a.m. and this sitting is adjourned.

The Court rose at 5.50 p.m.

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